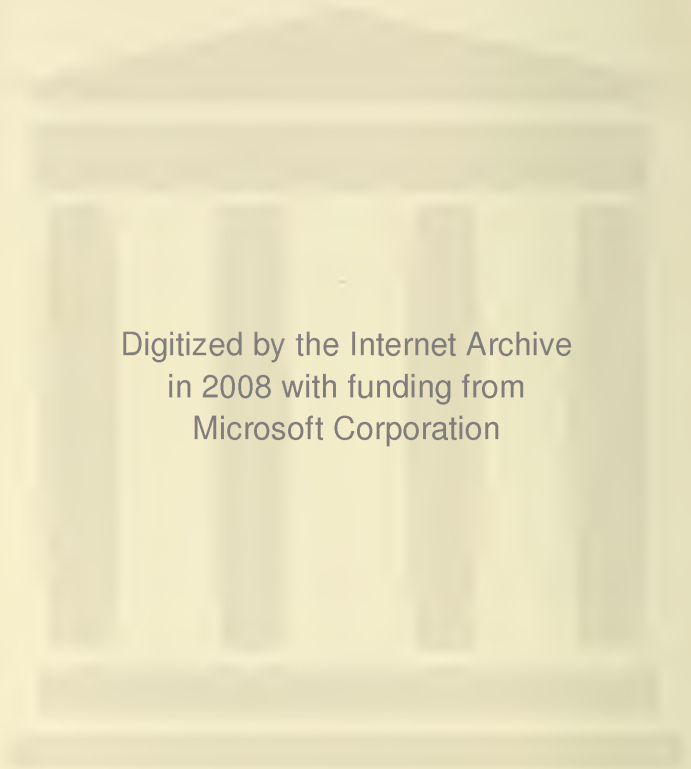

REPORTS

OF

DECISIONS IN PROBATE

BY

JAMES V. COFFEY
JUDGE OF THE SUPERIOR COURT

IN AND FOR THE

CITY AND COUNTY OF SAN FRANCISCO, STATE OF CALIFORNIA

REPORTED AND ANNOTATED BY

PETER V. ROSS AND JEREMIAH V. COFFEY,
Of the San Francisco Bar

VOLUME SIX

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PREFACE.

Such a cordial reception has been given to the first five volumes of Coffey's Probate Decisions, published six years ago, that the publishers now feel impelled to issue a sixth or supplementary volume, to include opinions which have since been handed down by Judge Coffey, as well as early opinions omitted from the original work because supposedly destroyed in the great San Francisco fire. Not a few decisions of this latter class have been found extant in the possession of Mr. Joseph J. Dunne and Mr. Hugo D. Newhouse, members of the San Francisco Bar, through whose courtesy they are now available for publication.

Many inquiries have been made from time to time as to how it was possible to obtain the material for the original five volumes, in view of the great conflagration of 1906. Perhaps no better answer can be given than by quoting from the review of Coffey's Probate Decisions written by Mr. George Hamlin Fitch in the "San Francisco Chronicle" of July 3, 1910:

"To Jeremiah V. Coffey, who is a nephew of the Judge, is due the credit of bringing out the work. At the time of the fire all the material was destroyed in the Judge's chambers. It looked as though the work would have to be abandoned. But Jeremiah V. Coffey undertook the task of collecting the materials from lawyers who had kept pamphlets and newspaper clippings or scrap-books of decisions and from old files of the 'Law Journal' and 'The Recorder.' It required faith, patience, intelligent industry, and confidence in professional appreciation, that has not been misplaced, and it is due to him that this acknowledgment be made. After all these vicissitudes and only four years after the great fire which wiped out in a few minutes the record of the labor of a lifetime, the work now appears."

April, 1916.

P. V. ROSS.

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COFFEY'S

PROBATE DECISIONS.

Estate of THOMAS W. MAHONEY, Deceased.

[April 15, 1902.]

Will—Testamentary Capacity—Intemperance and Improvidence.—A man may be greatly given to the use and abuse of liquor and yet be competent to make a will. He may be incompetent to manage an estate by reason of intemperance and improvidence and yet retain sufficient capacity for testamentary disposition.

Will — Testamentary Capacity — Dissipation and Intoxication.—No rule of law denies to a man who is dissipated and habitually addicted to the excessive indulgence in intoxicants the right to make a will.

Will—Testamentary Capacity.—The Habitual Use of Intoxicating Liquors, long continued and indulged in to excess, even though resulting in temporary fits of insanity or delirium tremens, does not alone raise a presumption of testamentary incapacity, if it appears that the testator was sufficiently sober when executing the will to know what he was doing, and that he was not unduly influenced. Nor need he be shown to have been wholly sober at the instant of the execution of the will if it is proved that he was sufficiently so to understand the character and effect of his act, the extent of his property and the nature of the claims of his kin, and be able to act of his own will.

Will—Intoxication of Testator.—In Order to Vitiate the Act, the testator, at the time of executing the paper, must have been under the influence of intoxicating liquors and to such an extent as to disorder his faculties and prevent his judgment.

Will—Undue Influence.—The Fact of Drunkenness when the will was executed is relevant upon the question of undue influence.

Will—Testamentary Capacity—Lucid Intervals.—In Cases of Temporary Delirium, arising from the excessive use of stimulants, where no question of fixed and mental unsoundness is involved, the doctrine of lucid intervals does not apply.

Will—Intoxication of Testator—Burden of Proof.—Though the testator may have, when under the influence of liquor, acted like a maniac, still, if when subsequently sober he acted rationally and sanely, the burden is on the party asserting his testamentary in-

capacity, to show that he was incapable at the date of the execution of the will. The rule is the same where it conclusively appears that on one or more occasions prior to the time of execution, the testator had had attacks of dipsomania.

Insanity.—The Habitual and Excessive Use of Intoxicating Liquors as a beverage may result in permanent insanity. By permanent insanity is meant in this connection not merely dipsomania, but a condition of fixed and continued mental unsoundness.

Insanity — Presumption from Habitual Intoxication.— Permanent insanity cannot be presumed from proof of habitual drunkenness, however excessive or long continued.

Will — Testamentary Capacity — Person Under Guardianship.—The fact that the testator, at the time of the execution of the will, is in charge of a guardian as an habitual drunkard, while relevant as some evidence of incapacity, is never conclusive that a will is invalid.

Insanity.—Proof of Habitual Drunkenness is Relevant upon the issue of insanity, its weight depending upon all the circumstances of the case.

Insanity.—Whether Long-continued Inebriety has or has not Impaired the mind and destroyed a sound and disposing memory is a question of fact which will depend upon all the circumstances, including the physical and mental condition of the testator, his age and sex, his previous life and habits and present surroundings.

Insanity.—In Determining Whether Habitual Drunkenness has or has not resulted in permanent insanity, or delusions assimilating to that condition, the evidence must not be confined to the personal habits of the testator, but the surrounding circumstances and his bodily condition must also be considered.

Will—Intoxication.—No Presumption That a Man was so Drunk when he made a will that he was incapable of making it properly arises from proof that he had been drunk at a prior period or that he was an habitual drunkard.

Will.—The Intoxication of the Testator, if It is Proved to exist at the date of the execution of the will, must, in order to invalidate it, have been of such a character as to have deprived him of judgment while executing it.

Will.—In Order That the Will of a Drunkard may be Invalidated because of his habits of intoxication, it must appear affirmatively, either that his mind was totally destroyed thereby or that he was so far under the influence of intoxicants at the instant of its execution that he was incapable of comprehending the nature, extent and disposition of his estate and his relations to those who have a claim upon his bounty.

Will—Habitual Drunkard—Judicial Determination.—The burden of proof is upon the contestant, even where it conclusively appears that

the testator has been judicially pronounced an habitual drunkard, to show that he was in such a condition from intoxicants at the time of execution as not to have testamentary incapacity.

Will.—In Testifying to the Intoxication of the Testator, a witness is merely stating his opinion as to his condition, and any person who knows the testator, though he be not an expert, may testify to the fact that he was intoxicated upon a stated occasion, for the subject is one upon which any intelligent person is competent to form an opinion.

Will—Intoxication of Testator.—A Witness will not be Allowed to State that, in his opinion, the testator was so drunk at the date of execution as not to be capable of making a valid will, or to give his opinion that he was unduly influenced in the making of his will by reason of intoxication.

Will.—A Witness may Testify That, in His Opinion, the Testator was an habitual drunkard, though his habitual drunkenness has never been judicially determined.

Will.—Where the Testator is Alleged to have Been Drunk at the time he executed the will, it is admissible to prove his conduct upon previous occasions when he was under the influence of drink, to illustrate his usual manner of acting when intoxicated.

Will.—The Fact That the Testator was an Habitual Drunkard may be proved by the evidence of his commitment as such, with proof that he has not adopted reformed habits of living.

Will—Intoxication of Testator.—It may be Shown That the Testator had an opportunity to procure liquor or that he had it in his possession, but his intoxication at any particular point of time cannot be inferred from the fact that at that time he had intoxicating liquors in his possesssion.

Will—Intoxication of Testator.—Where It Appears That the Testator had been drinking a short time before the execution of the will, evidence may be received to show how long it usually takes for a person to get sober. The period of time required for a person to become sober depends primarily on the person, and secondly on the quantity and nature of the intoxicants consumed.

Will—Epilepsy.—No One Possesses Testamentary Capacity during the actual paroxyms of an epileptic seizure, and the importance of proof that the deceased was subject to epileptic fits depends wholly on the proximity of the fit to the time of the execution of the will. The fact that the testator has had an epileptic seizure raises no presumption of continuing incapacity, and proof of epilepsy does not cast the burden of proving a lucid interval upon the proponent.

Administrator.—No Person is Eligible or Entitled to Serve as administrator who is incompetent to execute the duties of the trust by

reason of drunkenness, improvidence or want of understanding or lack of integrity, and it must be presumed that the appointing power discharged its duties and appointed a sane, sober, provident and honest man to execute the trust of administrator.

Evidence.—**A Judge is not at Liberty Judicially to Poise His Personal** impression against the solemn statement under oath of two reputable witnesses to the factum.

Will.—**A Testator has No Legal Burden Imposed upon Him to Provide for His Uncle,** and a failure so to provide is neither unnatural nor necessarily undutiful, especially where the person unprovided for is unknown or thousands of miles distant, and where no communication or correspondence passed between such collateral relative and the testator.

Will—Undue Influence.—**The Mere Existence of Confidential Relations** between the testator and the principal beneficiary under his will, who is also the proponent, does not raise the presumption that the will was procured by the exercise of undue influence nor impose on the proponent the burden of disproving undue influence, fraud or coercion; there must be, in addition to that fact, evidence of his active interference in procuring the execution of the will before that presumption arises.

Will.—**If a Presumption is to be Indulged, It is Rather** in favor of a will when the testator leaves property to one with whom he had intimate and confidential relations during his life, as it is usually designed to give property to those whom the testator desires to favor.

Will.—**The Declarations of a Testator in Support of His Will** are admissible to establish freedom of volition and exemption from undue influence and to maintain the testamentary instrument as having been made in consonance with the wishes of the testator.

Will—Undue Influence.—**A Person cannot be Called upon to Prove** that a transaction with which he had nothing to do, was a fair one; hence no presumption of undue influence can arise as to such person.

Evidence.—**Neither the Verdict of a Jury nor the Decision of a Court** can rest on surmise, suspicion or conjecture, howsoever strong.

Theodore J. Savage and Martin C. Hassett, for contestant.

John M. Burnett and Matt I. Sullivan, for proponent and respondent.

COFFEY, J. This is a contest on an application for probate of an alleged will on the grounds of unsoundness of mind, fraud and undue influence. The paper propounded is in words and figures as follows:

"In the name of God Amen.

"I Thomas W. Mahoney unmarried and being of sound and disposing mind and memory, and not acting under duress, menace, fraud or undue influence of any person whatsoever do make, and publish and declare this my last will and testament in the manner following that is to say,

"1.

"I direct that my body be decently buried with proper regard to my situation and condition in life and the circumstances of my estate.

"2.

"I direct that my executor hereinafter named as soon as he has sufficient funds in his hands pay all just debts, and funeral expenses and the expenses of my last sickness.

"3.

"I give and bequeathe to Frank Conklin of the City and County of San Francisco all of my estate, real, personal or mixed, of which I may die seised or in which I may have any interest at the time of my death. To have and to hold the same to him and his executors, administrators, and assigns for ever.

"4.

"I hereby nominate and appoint Frank Conklin of the City and County of San Francisco executor of this my last will and testament without bonds.

"December 4th, 1900.

THOMAS WM. MAHONEY.

"M. C. HOGAN,

"S. D. CHIUCOVICH,

"Witness."

It is unnecessary to state in detail the evidence in this contest or to recapitulate the points on either side. The testator was addicted to drink from an early period of his life to the time of his death, at the age of less than forty years. After his father's death there was an appreciable abatement in his appetite, but prior to that event he was a steady tippler, if not a regular toper; but a man may be greatly given to the use and abuse of liquor and yet be competent to make a will.

He may be incompetent to manage an estate by reason of intemperance or improvidence, and yet retain sufficient capacity for testamentary disposition. No rule of law denies to a man who is dissipated and habitually addicted to excessive indulgence in intoxicants the right to make a will. Underhill, in his recent and valuable treatise on the Law of Wills, deduces as the result of the authorities on this point that the habitual use of intoxicating liquors, long continued and indulged in to excess, even though resulting in temporary fits of insanity or delirium tremens, does not alone raise a presumption of testamentary incapacity, if it appears that the deceased was sufficiently sober when executing the will to know what he was doing, and that he was not unduly influenced. Nor need he be shown to have been wholly sober at the instant of the execution of the will, if it is proved that he was sufficiently so to understand the character and effect of his act, the extent of his property and the nature of the claims of his kin, and to be able to act of his own will.

"In order to vitiate the act, the testator, at the time of executing the paper, must have been under the influence of intoxicating liquors, and to such an extent as to disorder his faculties and prevent his judgment."

But the fact of drunkenness when the will was executed is always relevant upon the question of undue influence. For a man whose mental and physical powers are weakened and confused by alcoholic intoxicants cannot, while he is under this influence, exert his will in its full vigor or manfully resist the importunity of those about him.

The characteristics of temporary insanity which is the result of an over-indulgence in alcoholic stimulants are clearly distinguishable by the most superficial observer from symptoms which attend other forms of mental unsoundness. In delirium tremens the periods of insanity are of limited duration, and these are succeeded by intervals of calm, during which the patient, though perhaps physically exhausted, is mentally himself again. As the sufferer proceeds along the road to his ultimate recovery, the paroxysms are less severe and of shorter duration, and the intervals between them grow longer and more frequent. If the course of the disease is

favorable, the gradually diminishing paroxysms at length cease altogether, and the patient, provided his physical system has been fortified by proper methods to withstand the strain put upon it, finds himself fully restored to reason. The insidious poison contained in the alcohol, which has produced in his excited brain the delusions which have tortured his waking hours and made his sleep a thing of horror, having been eliminated from his system, the delusions themselves have totally disappeared. Such a state of delirium as has been described is wholly temporary, for the reason that the cause which produced it is temporary; and the cause being removed, the effect will also disappear. Here there is no question of a lucid interval. The man is restored to his former health and his reason is again firmly seated on her throne. True it is, that if he shall repeat his former error the result may be the same or perhaps worse. But that would be a new delirium, not a continuation of the former one. For, while he is sober he is sane and possesses testamentary capacity.

In cases of temporary delirium, arising from the excessive use of stimulants, and where no question of fixed mental unsoundness is involved, the doctrine of lucid intervals does not apply. Though the testator may have, when under the influence of liquor, acted like a maniac, still, if when subsequently sober he acted rationally and sanely, the burden is on the party asserting his testamentary incapacity to show that he was incapable at the date of the execution of the will. The rule is the same where it conclusively appears that on one or more occasions prior to the time of execution the testator had had attacks of dipsomania.

The habitual and excessive use of intoxicating liquors as a beverage, continued for some time, may, according to the best medical authorities, result in permanent insanity. By permanent insanity is meant, in this connection, not merely dipsomania, but a condition of fixed and continued mental unsoundness. Permanent insanity, however, cannot be presumed from proof of habitual drunkenness, however excessive or long continued. And the fact that the testator at the time of the execution of the will is in charge of a guardian as an

habitual drunkard, while relevant as some evidence of incapacity, is never conclusive that a will is invalid. But proof of habitual drunkenness is always relevant upon the issue of insanity, its weight depending upon all the circumstances of the case. Whether long-continued inebriety has or has not impaired the mind and destroyed a sound and disposing memory is always a question of fact, which will depend upon all the circumstances, including the physical and mental condition of the testator, his age and sex, and his previous life and present surroundings. All these facts must be considered in connection with the habit of the testator.

It is well known that the effect of the indulgence in intoxicating drink varies according to the circumstances and bodily condition of the person. Some can drink large quantities of liquor without any apparent diminution of their physical or mental powers, either because they are of exceptional physical strength or vigor, or because their avocations minimize the intoxicating and debilitating effect of what they drink. Others succumb to the most ordinary indulgence. The imbibition of a quantity of liquor which in one case would produce little, if any, effect, may in the other produce a high state of mental excitement, and, if long continued, a permanent cerebral deterioration. In determining, therefore, whether habitual drunkenness has or has not resulted in permanent insanity, or delusions assimilating to that condition, the evidence must not be confined to the personal habits of the testator, but must take a wide range along the lines just pointed out.

No presumption that a man was so drunk when he made a will that he was incapable of making it properly, arises from proof that he had been drunk at a prior period, or that he was an habitual drunkard. The intoxication of the testator, if it is proved to exist at the date of the execution of the will, must have been of such a character as to have deprived him of judgment while executing it. For, in order that the will of a drunkard may be invalidated because of his habits of intoxication, it must appear affirmatively either that his mind was totally destroyed thereby, or, if this is not shown, that he was so far under the influence of intoxicants at the instant

of its execution that he was incapable of comprehending the nature, extent and disposition of his estate and his relations to those who have a claim upon his bounty. And the burden of proof is always upon the contestant, even where it conclusively appears that the testator has been judicially pronounced an habitual drunkard, to show that he was in such a condition from intoxicants at the time of execution as not to have testamentary capacity.

Any witness who knows the testator may, though he is not an expert, testifying that he was intoxicated upon a certain date. In testifying to the intoxication of the testator, the witness is merely stating his opinion as to his condition; but his evidence is not, for this reason, to be rejected, as the subject is one upon which any intelligent person is competent to form an opinion. The proof of intoxication is most valuable when it refers solely to the time of the execution of the will. The object of the evidence of intoxication is to show that his mental capacity was so far weakened or destroyed by drink that at the date of execution he did not possess testamentary capacity, or that his mind was then under an undue and improper influence. But evidence of intoxication on other dates is not irrelevant, particularly if it appears that the testator was addicted to the habitual use of intoxicants.

Where the testator is alleged to have been drunk at the time he executed the will, it is admissible to prove his conduct upon previous occasions, when he was under the influence of drink, to illustrate his usual manner of acting when intoxicated. A witness will not be allowed to state that in his opinion the testator was so drunk at the date of execution as not to be capable of making a valid will, or to give his opinion that he was unduly influenced in the making of his will by reason of intoxication. These are questions for the jury. The fact that the testator is an habitual drunkard may be proved by the evidence of his commitment as such, with proof that he has not adopted reformed habits of living. A witness may testify that in his opinion the testator was an habitual drunkard, though his habitual drunkenness has never been judicially determined. This is the rule in criminal cases, and

is believed to be equally applicable where the issue of intoxication arises in the probate of a will.

The fact that the testator had an opportunity to procure liquor, or that he had it in his possession, is relevant; but his intoxication at any particular point of time cannot be inferred from the fact that at that time he had intoxicating liquors in his possession.

Where it appears that the testator had been drinking a short time before the execution of the will, evidence may be received to show how long it usually takes for a person to get sober. The period of time required for a person to become sober depends, primarily, on the person, and, secondly, on the quantity and nature of the intoxicants consumed.

There is some evidence that testator had had attacks of falling sickness, or what is known medically as epilepsy.

The importance of proof that the deceased was subject to epileptic fits depends wholly on the proximity of the fit to the time of the execution of the will. It certainly requires no professional knowledge to affirm that no one possesses testamentary capacity during the actual paroxysm of an epileptic seizure. The mind of the patient is wholly overcome by the violence of the spasm. He has no control of his physical powers, and his signature or mark affixed to a writing while in this condition would conclusively be presumed not to be his voluntary mental act. The unconsciousness caused by the fit is usually temporary, its length depending upon the degree in which the physical constitution of the patient had succumbed to the disease. The paroxysm is usually succeeded by a period of extreme physical exhaustion and mental weakness, extending over two, or perhaps three days. The patient then usually regains his normal condition, which continues until his subsequent seizure by a similar spasm. The fact that the testator has had an epileptic seizure raises no presumption of continuing incapacity. The fact may be proved for what it is worth. And proof of epilepsy does not cast the burden of proving a lucid interval upon the proponent, for, after the convulsion with its attendant weakness has subsided, the mind is usually restored, to outward appearances at least, to its former normal condition. And it may be

shown in evidence that after his recovery the deceased continued to transact his ordinary business as usual.

It is alleged by contestants that for many years prior to his death the decedent was an inebriate, addicted to the intemperate use of alcoholic liquors, and constantly under their influence, and that by reason of those habits he became and was greatly weakened and impaired in body and mind, and his understanding became and was cloudy and his will weakened. During all of said times decedent was the administrator of the estate of his deceased father, and during all of said times he employed Frank Conklin (the proponent here, executor, and sole beneficiary), as his agent, and the said Frank Conklin was his agent, and as such agent, gained, held and retained during all of said times, the entire confidence of the said decedent. It is alleged by contestant that by reason of the inebriety of the said decedent and the agency of the said Frank Conklin, he, the said Frank Conklin, obtained, held and exercised during all of said times, a dominating influence over the mind and will of the said decedent, and during all of said times, acquired and held a real authority over him, and caused said decedent to repose a confidence in him; and that at and prior to the alleged making of said will deceedent became, and for a long time prior thereto, he was absolutely subject to the wishes and will of said Frank Conklin, and childishly followed his will and directions without exercising any independent will of his own. That said Frank Conklin, at and before the execution of said proposed will, actually used the said confidence so reposed in him by said decedent as aforesaid, and actually used the said authority over the said decedent so held by him as aforesaid, for the purpose of obtaining an unfair advantage over said decedent, to wit: For the purpose of compelling him to sign the said proposed will bequeathing to him, the said Frank Conklin, all of the property of said decedent; that said Frank Conklin originated the said will, and the same was prepared by him or under his directions, and the same was the expression of his wishes and purpose, and not those of the decedent; and that the said Frank Conklin importuned, commanded and directed the said decedent to sign and execute the said will, and by reason of said undue influ-

ence so exerted as aforesaid, compelled the signing and execution of said proposed will by decedent, and exerted said undue influence upon said decedent in relation to and upon every act of executing said will, and thereby deprived the said decedent of all independent power of will in that particular, and coerced the said will and mind of said decedent and the signing and execution of said will, and that said decedent at said time could not resist said undue influence and did not resist the same; that the said decedent would not have executed the said will but for the confidence reposed by him in the said Frank Conklin, and but for the authority of said Frank Conklin, and that said will was executed by said decedent wholly and entirely by reason of said confidence in and authority of the said Frank Conklin, and the undue use thereof by the said Frank Conklin as aforesaid; and that if the said undue influence had not been exerted by said Frank Conklin upon said decedent as aforesaid, the said decedent would not have signed or executed the said will.

Contestant claims that the proponent's own witnesses prove that decedent was a constant drinker and a confirmed inebriate. Proponent concedes as the effect of the evidence that the decedent became intoxicated occasionally, but contends that such intoxication was intermittent after his father's decease, and that he was more frequently sober than inebriated after that time.

Within the temporal term, "many years," embraced in contestant's allegation, decedent was appointed and acted as administrator of his father's estate.

From January 25, 1897, to January 15, 1901, he so served. Under the statute no person is eligible or entitled to serve as administrator who is incompetent to execute the duties of the trust by reason of drunkenness, improvidence, or want of understanding, or lack of integrity.

It must be presumed that the appointing power discharged its duties and appointed a sane, sober, provident and honest man to execute the trust of administrator.

Is this presumption borne out by the evidence as to the manner in which the decedent fulfilled the functions of his office?

Decedent was appointed administrator of his father's estate January 25, 1897. His father was indebted at the time of his decease in large sums, principally to two banks secured by mortgage, interest payable monthly. This interest was paid punctually by the administrator. A very advantageous lease of the entire property on the corner of Sixth and Bryant streets for five years at $175 per month for the first three months, and $200 per month thereafter, was made in April, 1898, the negotiations initiated by decedent. In March, 1900, the City Hall lot, subject to mortgage to French Bank for $6,000, was sold and the sale confirmed; the monthly interest of about $23 thereon ceasing as to the estate; thereupon the minor obligations and bills were liquidated, and in June or July, 1900, the mortgage to the Hibernia Bank was renewed by leave of court, and decedent had an assured net income of $125 per month. In these transactions the part taken by decedent evinced sanity and sobriety.

The evidence affords no pretense for contending that decedent was intoxicated at the time of the transaction.

Thirty witnesses testified to their opinions in favor of the sanity of decedent, supporting those opinions by reasons among which were his intelligence shown in conversation, his recognition of acquaintances, addressing them by correct name; he assisted about the Conklin establishment, addressed parcels, drove wagons, delivered goods, answered telephone calls, inscribed orders in book kept for that purpose, accurately and intelligently written; he carried checks to the grand secretary of the Order of Foresters; he discussed the topics of the day with various persons; he expressed himself with clearness in favor of the new charter for San Francisco; he approved of the acquisition of the Philippine Islands and advanced valid commercial grounds to support his judgment, such as, that the material advantage of this metropolis would be enhanced thereby, and, therefore, as a property holder he would benefit; he thought, also, that if we did not seize the situation with alacrity, some other power would grasp the Oriental Archipelago and our opportunity unimproved would be a local calamity. He was not concerned with the moral

quality of the proposition; his views were solely sordid in the premises.

He was fond of playing cards and was accounted by his associates a "foxy player," quite cunning in his handling of the pasteboards and deft in his dealing; he was eager to win and keen to realize, showing in this regard the symptoms of sanity common to the votaries of games of this character. He was trusted to take large sums of gold of high denominations to the city treasury to exchange for smaller coins, and without any memoranda always returned the exact equivalent. He was prompt in observing his engagements in court and with his counsel, never missing an appointment except once, about a week prior to his decease; this was immediately before he went to the hospital, whence he never came out alive.

Decedent gave reasons for making his will, that he was unwell and that his physician had advised him to arrange his affairs; he signed and verified various papers filed in the estate proceedings; he gave sensible testimony in court. When the City Hall lot was sold he favored the sale on plausible grounds, although he thought the price too low, but the best that could be obtained at the time; he arranged with Beckman for the lease of the Sixth street property and executed it; he executed the will properly; he favored the election of Mr. Bryan to the Presidency, because as a consequence the silver mines would be reopened and developed and better times would ensue; he gave correctly to the letter-carrier the addresses of persons whose letters were sent to Conklin's place and who had changed their directions; he went to the theatre and criticised the performance; he made arrangements for boarding at the restaurant; he discoursed rationally on the administration of municipal government, advocated certain candidates because their success would result in the reduction of taxation, and in many other particulars and respects he behaved like any rational man. This is about the sum of the testimony of the witnesses for the proponent.

The evidence for contestant on the issue of unsoundness of mind does not disturb the deduction that at the time of the transaction the decedent was of sound mind. At the time of the execution of the will there is no evidence that he was men-

tally incompetent, and the testimony as to his general competency preponderates for proponent.

As to the issue of undue influence and fraud there is no direct evidence that proponent importuned, commanded or directed the decedent to sign and execute the will, but there are circumstances tending to show that the Conklins were potential in persuasion over the conduct and actions of decedent and exercised considerable sway over his daily course of life.

Contestant claims, as the effect of the evidence, that decedent was entirely under the influence of the Conklins; that he had no control of himself; that he was a mere child in their hands; that he was dependent upon them for his daily drams, and could not be trusted except with the dimes doled out to him by them; that they improperly and unduly induced and influenced him to execute a deed of his property to proponent, for which there was not a dollar of consideration, delivered on the day of his death, and that the will was concocted to bolster up the deed, and that the story of William Conklin, the brother of proponent, is a mere figment of his imagination, intrinsically improbable if not incredible, and that the inference is irresistible that the will was leisurely drawn up by William Conklin long before its date from some legal form and preserved to await an opportunity to secure the signature of decedent, or more likely that the signature of decedent was first obtained and then the scrivener wrote the testament above the name, and that the names of subscribing witnesses were appended after the death of decedent as a favor to proponent.

This is contestant's theory of the manner in which this instrument was fabricated; but Hogan and Chiucovich testify with positiveness and particularity as to the execution and the attendant circumstances. What is there to contradict their sworn statements? The contestant contends that the document itself contradicts their testimony, that the difference in the inks is an item in itself of pregnant significance, the date and the names of the witnesses being in a blue fluid on the main body of the instrument and the testator's signature in deep black.

This is certainly remarkable, but in view of the evidence given by these two men, Hogan and Chiucovich, uncontradicted and unimpeached, the court is not at liberty to find that there were not two kinds on the table and that they happened to select the blue and testator used the black.

My own impression is that William Conklin prepared the paper some time in advance of its final execution and that testator signed it without date, and that it was so signed when the subscribing witnesses were requested to witness the instrument by decedent; but I am not at liberty judicially to poise my personal impression against the solemn statement under oath of two reputable witnesses to the factum. I must conclude, therefore, that so far as the legal mechanism of the transaction is concerned, the conditions of the statute were observed.

Bernard Conway, a witness for contestant, testified that the decedent told him about six months before his death that William Conklin had induced him to sign a paper without knowing its contents. That conversation could not have concerned this disputed document, unless the subscribing witnesses have sworn falsely, for they testify that testator declared that this was his "first and last will," and, without discrediting Conway, his statement cannot be referred to this instrument, and the court is not permitted to consider in this connection any other paper than the one propounded.

Decedent was a native of Placer county, California, and appears to have had no knowledge of or acquaintance with his collateral relatives, save one uncle, who predeceased him. In the absence of proof to the contrary, it may be presumed that he had none such when he made his will; but assuming that he had avuncular relatives and that their existence was known to him, he was under no obligation ordinarily to make testamentary provision for them.

The supreme court has decided that an uncle is not bound to provide for his nephew; and, conversely, the nephew has no legal burden imposed upon him as to his uncle. A failure so to provide is neither unnatural nor necessarily undutiful, especially where the person unprovided for is unknown or thousands of miles distant, and where no communication or

correspondence passed between such collateral relative and testator.

It has been testified that decedent said he had relatives in the eastern states whom he did not know, but that he had a friend to whom he intended leaving his property, and that friend was Frank Conklin.

It has been shown that Conklin was a friend of the family; that when the father of decedent died he requested Conklin to go on his bond; this undertaking was fixed at $3,500 by the court, Conklin procured another surety and both qualified and letters thereupon issued.

After installation decedent administrator made an arrangement in writing with his surety, whereby it was agreed between decedent, both individually and as administrator of the estate of Daniel Mahoney, deceased, that the value of the services of Conklin theretofore rendered, and thereafter to be rendered in and about the said estate, were fixed at the rate of $12.50 per month, the allowance to date from the 9th day of February, 1897, the date of the issuance of letters of administration in the estate. It was further agreed between the parties that when the financial condition of the estate should allow, Conklin should from time to time draw from the moneys collected on rents, the said sum of $12.50 per month, and that such payments should be credited by him on the said account. The date of this agreement was June 18, 1900.

Decedent was advised to this course by his attorney, who thought it prudent because of his client's liability to lapse into the liquor habit. Thereafter decedent made the establishment of Conklin his headquarters, went there to read the newspapers, spending a considerable portion of his time there, assisted in keeping or making entries in their order books, and rendered various voluntary services to the concern. He had a room in the house belonging to the estate and ate his meals at a refectory of his own selection.

Conklin kept the interest on the mortgages paid, so as to avoid foreclosure, paid decedent's bills, gave small sums to him according to his needs, took receipts for the amounts paid, as a cautious man should, so that there might be no disputes

thereafter; many receipts for money paid on decedent's account were made out in Conklin's name, he having paid them out of the funds collected. The account filed shows the payments made to decedent; he was an heir; the creditors had a right to know how much was being advanced to the decedent as the surety was responsible to them on his bond, and the account would enable them to see what was done with the money. The productive property of the estate was preserved intact, the drain of interest lessened; the funeral expenses of father and sister were paid; foreclosure averted; a net income of $125 a month assured.

Conklin collected and disbursed money as any ordinary real estate agent would have done, and received and paid it as any banker might have done, and he advised decedent as to his property affairs as a friend. He had no power to sell or lease, decedent alone under the sanction of the court could do this, and in the strict sense, as defined by law lexicons, the relation was not confidential or fiduciary.

"Fiduciary" and "confidential" relation seem to be used by the courts and law-writers as convertible expressions. It is a peculiar relation which exists between client and attorney, principal and agent, principal and surety, landlord and tenant, parent and child, guardian and ward, ancestor and heir, husband and wife, trustee and cestui que trust, executors and administrators and creditors, legatees, or distributees, appointer and appointee under powers, partner and part owners. In these and like cases the law, to prevent undue advantage from the unlimited confidence, affection or sense of duty which the relation creates, requires the utmost of good faith in all transactions between the parties.

According to the evidence adduced by proponent decedent appreciated the assistance of Conklin and declared that he was pleased to have such a man manage his property, because if he had got into the hands of some of those "sharks of lawyers" he would have had nothing left in a year or two; Conklin's management was conservative and justified his selection as manager.

It has been said by supreme judicial authority that the very considerations which must be removed in transactions inter

vivos—friendship, trust and confidence, personal obligations —may and generally do justly and properly give direction to testamentary dispositions.

The case of Bancroft v. Otis, 91 Ala. 279, 24 Am. St. Rep. 904, 8 South. 286, is the best considered case we have been able to find on this point. One of the points therein decided is that the mere existence of confidential relations between the testator and the principal beneficiary under his will, who is also the proponent, does not raise the presumption that the will was procured by the exercise of undue influence, nor impose on the proponent the burden of disproving undue influence, fraud, or coercion; there must be, in addition to that fact, evidence of his active interference in procuring the execution of the will, before that presumption arises.

There is no evidence in the case at bar that the proponent initiated the preparation of this instrument, or wrote it himself or dictated its terms, or gave directions as to its contents to the draftsman, or selected the witnesses to be present at its execution, or the like; or, in short, that the proponent-beneficiary was as a matter of fact active in respect to or in any way connected with the preparation and execution of the will.

If a presumption shall be indulged, it is rather in favor of a will when the testator leaves property to one with whom he had intimate and confidential relations during life, as it is usually designed to give property to those whom the testator desires to favor. A bequest of all of testator's property to one intimately connected socially and in business with him for years as a partner has been upheld by our supreme court. In such a case no presumption of undue influence can arise, unless the relation is used to procure the testamentary benefit. This is the result of all the authorities.

Decedent declared to several witnesses his intentions, and these declarations were admissible to establish freedom of volition and exemption from undue influence and to maintain the testamentary instrument as having been made in consonance with the wishes of the testator.

Proponent was not present when the document was drawn, nor when it was executed; he did not speak to decedent at any

time about making a will; and, hence, no presumption of undue influence can arise as to him operative upon the act. Certainly, as has been said by an appellate court, one cannot be called upon to prove that a transaction with which he had nothing to do was a fair one.

Even if proponent-beneficiary were present at the time of the transaction, unless he spoke to the testator about the will, no presumption arises. So said the supreme court in the Estate of Nelson, 132 Cal. 193, 64 Pac. 294.

It does not appear from the evidence that anyone spoke to decedent in reference to the manner in which he should dispose of his property or gave any suggestions in regard thereto.

It is true that the fraternal relations and intimacy in family and business between the draftsman of the document and the proponent-beneficiary and the improbable narrative of William Conklin as to the manner in which the instrument was composed from the dictation of decedent, who read from some paper in his pocket, which he replaced therein after he had finished, and the story of the finding of the will after the death of the testator suggest suspicion. All these statements seem dubious, if not apocryphal, in substance and circumstance, and might challenge credence as to other features of the proponent's case, if the court were free to consider them as against positive and trustworthy testimony, but the verdict or judgment may not rest on surmise, suspicion or conjecture, howsoever strong.

It is true that it is difficult to prove undue influence by direct evidence; in the nature of such an issue inheres a hardship which the court cannot relieve unless there is testimony so clear, convincing, and preponderant as to leave no alternative; but the case here made for contestant is not of that character. The will was executed properly and the attesting witnesses selected by the testator himself proved the soundness of his mind and its freedom from undue influence and fraud. Judgment for proponent.

As to Intoxication as affecting testamentary capacity, see Estate of Hill, 1 Cof. Prob. Dec. 380, and note.

ADJUDICATION OF INCOMPETENCY AS SHOWING WANT OF TESTAMENTARY CAPACITY.

An adjudication of insanity is admissible in evidence where testamentary capacity is in issue, but it is not conclusive of the question, although the adjudication was made prior to the execution of the will. Even then it is no more than presumptive or prima facie evidence of incapacity, throwing the burden of proof on the proponents of the will: Estate of Johnson, 57 Cal. 529; Mileham v. Montague, 148 Iowa, 476, 125 N. W. 664; Hawkins v. Grimes, 52 Ky. (13 B. Mon.) 257; Whitenack v. Stryker, 2 N. J. Eq. 8; Brady v. McBride, 39 N. J. Eq. 495; In re Pendleton's Will, 1 Con. 480, 5 N. Y. Supp. 849; In re Widmayer's Will, 34 Misc. Rep. 439, 69 N. Y. Supp. 1014, affirmed, 74 App. Div. 336, 77 N. Y. Supp. 663; Hart v. Deamer, 6 Wend. (N. Y.) 497; Demelt v. Leonard, 19 How. Pr. 140, 11 Abb. Pr. 253; L'Amoureux v. Crosby, 2 Paige Ch. 422, 22 Am. Dec. 655; Osterhout v. Shoemaker, 3 Hill, 513; Van Deusen v. Sweet, 51 N. Y. 378; Wheeler v. State, 34 Ohio St. 394, 32 Am. Rep. 372; Titlow v. Titlow, 54 Pa. 216, 93 Am. Dec. 691; Hottle v. Weaver, 206 Pa. 87, 55 Atl. 838; Sergeson v. Sealey, 2 Ark. 26, Eng. Reprint, 648; Kerr v. Lunsford, 31 W. Va. 659, 2 L. R. A. 668, 8 S. E. 493.

A person for whom a guardian has been appointed on the ground of insanity or incompetency is not necessarily incompetent to make a will but ordinarily the existence of the guardianship raises a presumption against his testamentary capacity. This presumption, however, is rebuttable, and can be overthrown by those who seek to uphold the will if they produce satisfactory evidence that at the time of the execution of the testamentary instrument the testator possessed the requisite degree of mental capacity: Estate of Hill, 1 Cof. Prob. Dec. 380; Lucas v. Parsons, 27 Ga. 593; Stevens v. Stevens, 127 Ind. 560, 26 N. E. 1078; Harrison v. Bishop, 131 Ind. 161, 31 Am. St. Rep. 422, 30 N. E. 1069; Pepper v. Martin, 175 Ind. 580; 92 N. E. 777; In re Fenton's Will, 97 Iowa, 192, 66 N. W. 99; Breed v. Pratt, 35 Mass. (18 Pick.) 115; Stone v. Damon, 12 Mass. 488; Crowninshield v. Crowninshield, 68 Mass. (2 Gray) 524; Rice v. Rice, 50 Mich. 448, 15 N. W. 545; King v. Gilson, 191 Mo. 307, 90 S. W. 367; Ames v. Ames, 40 Or. 495, 67 Pac. 737; Estate of Hoffman, 209 Pa. 357, 58 Atl. 665; In re Wheelock's Will, 76 Vt. 235, 56 Atl. 1013; In re Cowdry's Will, 77 Vt. 359, 3 Ann. Cas. 70, 60 Atl. 141; Will of Slinger, 72 Wis. 22, 37 N. W. 236.

Mere intellectual feebleness must however, be distinguished from unsoundness of mind. It is a well-known fact that many persons, especially elderly people, are willing to have a guardian, but are not willing to submit to an adjudication that would class them as insane. This fact prompted an amendment to the Vermont statute, which amendment recognized a difference between a non compos, and his class, and a person who merely lacks the mental capacity to take care of himself or his property. While the mind of a non compos is

to be taken prima facie as insane and nondisposing, the mere adjudication of a person's mental incapacity to take care of himself and his property, and the appointment of a guardian thereunder does not render him prima facie mentally incapable of making a will: In re Cowdry's Will, 77 Vt. 359, 3 Ann. Cas. 70, 60 Atl. 141.

The incapacity of guardianship is simply a fact, which may be proved like any other fact tending to establish mental incapacity, but it does not work an estoppel upon the proponent of a will: In re American Board etc. for Foreign Missions, 102 Me. 72, 66 Atl. 215; Breed v. Pratt, 35 Mass. (18 Pick.) 115.

It seems to be clear, then, that one's mental powers may be so far impaired as to incapacitate him from the active conduct of his estate, and to justify the appointment of a guardian for that purpose, and yet have such capacity as will enable him to direct a just and fair disposition of his property by will; and that one who has been adjudged to be of unsound mind and placed under guardianship is not necessarily incompetent to make a will, though such adjudication has never been set aside: Harrison v. Bishop, 131 Ind. 161, 31 Am. St. Rep. 422, 30 N. E. 1069; but he must in fact be of sound mind at the time of its execution: Breed v. Pratt, 35 Mass. (18 Pick.) 115; it being observed, however, that the requirements of a "sound and disposing mind" do not imply that the powers of the mind may not have been weakened or impaired by old age or bodily disease: In re American Board etc. for Foreign Missions, 102 Me. 72, 66 Atl. 215.

Even where a person under guardianship as non compos mentis makes a will appointing his guardian executor, and giving him a legacy, the fact of guardianship does ont estop the executor from showing that the testator, at the time of making his will, was of sound and disposing mind and memory: Breed v. Pratt, 35 Mass. (18 Pick.) 115.

A will may be made by a lunatic under guardianship, who has been restored to his reason, although the letters of guardianship have not been repealed: Stone v. Damon, 12 Mass. 488. The case of McAllister v. Rowland, 124 Minn. 27, Ann. Cas. 1915B, 1008, 144 N. W. 412, "holds that the adjudication of a person's incompeteney made subsequent to the execution of a will by him is admissible in evidence as bearing on the question of testamentary capacity. This point has been similarly decided in other jurisdictions: In re Loveland, 162 Cal. 595, 123 Pac. 801 (twelve days after); Kerr v. Lunsford, 31 W. Va. 659, 8 S. E. 493, 2 L. R. A. 668 (seventeen months after). See, also, Spiers v. Hendershott, 142 Iowa, 446, 120 N. W. 1058 (ten months after); Rice v. Rice, 50 Mich. 448, 15 N. W. 545 (few hours after); Whitenack v. Stryker, 2 N. J. Eq. 8. Compare In re Harvey (Iowa), 94 N. W. 559 (two years after). And in some cases, the courts seem to have received such evidence without passing on the specific question of its admissibility: Schmidt's Succession, 125 La. 1065, 52 South.

160 (seventeen months after); Brady v. McBride, 39 N. J. Eq. 495 (three years after); Titlow v. Titlow, 54 Pa. St. 216, 93 Am. Dec. 691 (seven months after); Russell v. Lefrancois, 8 Can. Sup. Ct. 335 (six weeks after). See, also, Ames v. Ames, 40 Or. 495, 67 Pac. 737 (few hours after).

It is said in the reported case that there is no difference, on the question of admissibility, between a subsequent adjudication of insanity and a subsequent guardianship appointment based on infirmity, debility or incapacity. This is probably true in the jurisdictions wherein subsequent adjudications are receivable in evidence: See In re Loveland, 162 Cal. 595, 123 Pac. 801; Spiers v. Hendershott, 142 Iowa, 446, 120 N. W. 1058. See, also, Ames v. Ames, 40 Or. 495, 67 Pac. 737. Compare In re Harvey (Iowa), 94 N. W. 559. However, a subsequent guardianship proceeding not taken on the issue of insanity, has been said to be "without important bearing" on the question of testamentary capacity: Rice v. Rice, 50 Mich. 448, 15 N. W. 545.

In the case of In re Loveland, supra, wherein it appeared that the adjudication of incompetency was made within eleven or twelve days after the execution of the will, the court said: "But, in addition, we have the adjudication of incompetency, following closely upon the execution of the will. There is no need to discuss appellants' claim that this adjudication was not conclusive on the question of Loveland's competency to make a will. The lower court did not assume to give it such effect. What it did was to admit such adjudication in evidence as showing that at the date of the adjudication, Loveland was so far incompetent as to justify the appointment of a guardian. This may not establish the want of capacity sufficient for the making of a will (Rice v. Rice, 50 Mich. 448, 15 N. W. 545), and of course could not fix the status of the person affected as incompetent to make a will on a date prior to that of the adjudication. But it is certainly evidence proper to be considered on the issue of want of testamentary capacity at the time of the appointment of the guardian. . . . And where there is testimony tending to show that the mental condition of the person has not changed between the date of the act in question and the appointment of a guardian, the appointment, although later in time, is admissible on the issue of capacity when the act was done. Here the connection between the time of the incompetency proceedings and that of the making of the will was sufficiently established both by direct testimony that the mental condition of Loveland had not changed in the interval separating the two dates and by the general aspect of the case, indicating, as it did, that any mental weakness on the part of Loveland was the result of that gradual decay which sometimes accompanies advanced age." And in Spiers v. Hendershott, supra, wherein it appeared that the contested will was executed in January, 1898, it was said: "The trial court permitted the contestants to introduce in evidence the record

of the guardianship proceedings whereby a guardian was appointed for the testatrix in November, 1898. Instruction No. 14 instructed the jury that they might consider such evidence in determining the mental condition of the testatrix at the time of making the will, and at the time of the alleged revocation. Appellants complain of the instruction, in that it failed to state to the jury that the appointment of such guardian was presumptive evidence of mental incapacity to make a will. Granting the contention that the order of the appointment of guardian created a presumption of mental incapacity on the part of the testatrix to make a will, such legal presumption could not relate back to a time antedating the proceeding resulting in such appointment. The appointment of a guardian did create a presumption of mental incapacity as of that time, and the fact was proper for the consideration of the jury on the question of mental incapacity as of the time the will was made, but the legal presumption as such could not relate back to the date of the will." In Kerr v. Lunsford, 31 W. Va. 659, 2 L. R. A. 668, 8 S. E. 493, wherein a will made by one Lewis Lunsford on April 27, 1881, was in contest, the court said: "The contestants offered in evidence an order made by the circuit court of Ohio county on the 4th day of October, 1882, adjudicating the said Lewis Lunsford to be insane and appointing a committee for him, with the petition and notice for said appointment; but the court refused to admit any of the papers except the notice and so much of the order as adjudicated, that said Lunsford was insane and appointed a committee for him. The contestants excepted. . . . What was properly the record of the inquisition, de lunatico inquirendo was proper evidence. . . . The last part of the order relating to the duties of the 'committee' is properly no part of the inquisition, and the court did not err in refusing to permit it to be read in evidence."

In New York, in Van Guysling v. Van Kuren, 35 N. Y. 70, evidence of the adjudication of a testator's insanity, made eight months after the execution of the will, seems to have been admitted. And in the case of In re Widmayer, 74 App. Div. 336, 77 N. Y. Supp. 663, evidence of a finding of incompetency, confirmed three weeks subsequent to the execution of the will, but made one week prior thereto, was received. In the case of In re Preston, 113 App. Div. 732, 37 Civ. Pro. 165, 99 N. Y. Supp. 312, it appeared that the will in contest was executed in March and that the testator was adjudged incompetent in December, following. The court said: "The ruling of the surrogate admitting that portion of the inquisition finding Preston [the testator] incompetent for more than a year prior to the time it was taken, was erroneous. Section 2335 of the Code of Civil Procedure expressly limited and confined the inquiry as to the competency of Preston to the time of the hearing, which was December 6, 7 and 8, 1904. It is immaterial that the petition upon which the proceeding was instituted omitted the word 'lunacy,' and alleged

incompetency arising from old age, loss of memory, and understanding as its basis, as the word 'lunacy' as used in section 2335 of the code, under the provisions of section 7 of the Statutory Construction Law (Laws 1892, c. 677), evidences all phases of alleged incompetency, except idiocy, including imbecility arising from old age and loss of memory or understanding."

Some jurisdictions have declined to admit, on the issue of testamentary capacity, an adjudication of incompetency, made subsequent to the execution of the will: Terry v. Buffington, 11 Ga. 337, 56 Am. Dec. 423 (five years after); Taylor v. Taylor, 174 Ind. 670, 93 N. E. 9 (five years after); Watson v. Watson, 137 Ky. 25, 121 S. W. 626 (six months after). See, also, Entwistle v. Meikle, 180 Ill. 9, 54 N. E. 217 (two or three years after). Compare Hawkins v. Grimes, 13 B. Mon. (Ky.) 257. In Terry v. Buffington, supra, referring to an adjudication of incompetency made five years after the execution of the will, the court said: "Had the insanity of the testator been legally established before the will was made, its continuance would have been presumed, and the onus cast upon the propounders of the will, to show that the disqualification had been reversed. The maxim is, semel furibundus semper furibundus praesumitur. The converse of the proposition, however, or the doctrine of relation back, does not hold in such cases. The strongest objection, perhaps, to the admissibility of this judgment of lunacy is that it is res inter alios acta. The record does not disclose that the propounders of the will were parties or privies to that proceeding."

One jurisdiction, in declining to receive such evidence, has indicated that it might be admissible when closely connected in point of time with the execution of the will: Taylor v. Taylor, 174 Ind. 670, 93 N. E. 9.

The rule for exclusion seems to gain emphasis in case the subsequent adjudication is based on infirmity or incapacity rather than on insanity: See Entwistle v. Meikle, 180 Ill. 9, 54 N. E. 217; Watson v. Watson, 137 Ky. 25, 121 S. W. 626. In Entwistle v. Meikle, supra, the court said: "The appellants offered in evidence the record of the county court of Ford county to show that in 1896 or 1897—two or three years after the execution of the will—a conservator was appointed over the estate of James Entwistle. The court excluded the evidence and this ruling is relied upon as error. The fact that a conservator was appointed some two or three years after the will was executed would not establish the fact that the testator did not have sufficient mental capacity to make a will. The question in issue on the trial was as to the testamentary capacity of the testator on May 31, 1894—not whether, under chapter 86 of the Revised Statutes, there should be appointed a conservator to take charge of his property to prevent him from dissipating or wasting his estate, and the determination of the latter question would not settle the former. Conceding that the appointment of a conservator was proper, it does not

follow that the testator did not possess testamentary capacity to make a will. It may be that the record of the county court had a remote bearing on the question, but it was so remote that it was not error to exclude it from the consideration of the jury." In Watson v. Watson, supra, it was said: "The court allowed the contestants to read to the jury the verdict and judgment finding him mentally incompetent to manage his estate by reason of infirmity and age in August, 1906. This was error. It takes less capacity to make a will than to transact business generally. A person may by reason of infirmity and age be mentally incompetent to look after a farm and attend to business transactions of this sort when he would be entirely competent to make a will. At the time the inquest was held he was sick in bed, and too sick to be moved from the house for some weeks after the inquest. A man in this condition might well be in the judgment of a jury incompetent from age and infirmity to take care of his estate. This was not the issue to be tried here. The question here is: Had he testamentary capacity in February, 1906? The verdict of the jury found six months later upon a different issue would serve only to confuse and mislead the jury, and should not have been admitted."

ESTATE OF WILLIAM BROWN, DECEASED.

[No. 15,983; 1899.]

Will—Due Execution—Evidence of Scrivener's Experience.—On the issue of due execution of a will, the testimony of an attesting witness who drew the instrument that he has had experience in drawing wills is admissible.

Will—Competency of Testator—Evidence.—On the issues of mental competency of a testator and undue influence in the execution of his will, evidence of the pecuniary circumstances of a legatee and of her husband is inadmissible.

Will—Failure of Memory of Witness.—The fact that an attesting witness to a will cannot remember the details of the transaction does not cast a cloud upon the due execution of the instrument established by other direct evidence and circumstances.

Will—Competency of Testator—Age and Physical Infirmities.—Evidence of the advanced age of a testator and of his physical infirmities, if they did not impair the operation of his mind in the making of his will, does not establish testamentary incapacity.

Linforth & Whitaker, H. A. Massey and Dunne & McPike, for contestants.

Bishop & Wheeler and L. M. Hoefler, for proponents.

DECISION ON MOTION FOR NEW TRIAL.

COFFEY, J. The court erred in the exclusion of the testimony of Mr. Sonntag, as to his experience in drawing wills. This testimony should have been allowed to remain in the record and it was material error to strike it out (Exception 33, B. of E., page 140): Gable v. Rauch, 50 S. C. 95, 27 S. E. 555.

The court erred in admitting testimony as to the pecuniary circumstances of Mrs. Tolford and husband prior to the making of the will (Exceptions 23 and 24, B. of E., page 114): In re Kaufman, 117 Cal. 288, 59 Am. St. Rep. 179, 49 Pac. 192. See language of Mr. Justice Harrison on page 296. This error was material.

There is no sufficient, if any, support for the finding of the jury against the due execution and attestation of will. The defeat or failure of memory of witness Hopkins as to the details of the transaction cannot cast a cloud upon the fact of the execution established by other direct evidence and circumstances. Mr. Hopkins identified his signature to the attestation clause, but could not recall particulars as to signature by the testator for any request or declaration by decedent; Hopkins remembered only that Sonntag requested him to subscribe his name and he did so as a witness. Mr. Sonntag's testimony corrects any infirmity in the memory of the other subscribing witness, Mr. Hopkins, and it is not necessary to suggest sinister motive in the latter. The attestation clause itself would cure total lapse of memory in both witnesses.

The main issues are the alleged mental incompetency of the testator on the 13th day of February, 1891, and alleged undue influence of Mrs. Tolford upon the testamentary act.

In view of the elaborate arguments of counsel and their minute analysis of the testimony taken on the trial, it were idle to recount the evidence on these issues. Reading of their briefs relieved the tedium of vacation and supplied the vacuum between sessions of court during the summer season and hastened the approach of the autumnal equinox. I have read again and again simply to enjoy the reading as a rare pleasure of the intellect; but all pleasures of deliberation must end in the pain of deciding, and so in this case.

The burden of proof is upon plaintiffs, and assuming, as established, all the facts relied upon in their written discussion, I fail to find sufficient evidence to support the verdict upon either issue. None of those facts bore upon the transaction itself. At the time of the execution of the instrument there is absolutely no evidence to show that testator was either insane or unduly influenced. All of the authorities are against the contrary contention, and the evidence in support of the testamentary act is greatly preponderant, and upon the immediate act all one way; likewise, as to undue influence. The age and physical infirmities of the decedent do not affect this conclusion as they did not impair the operation of his mentality upon the act itself.

I have been reluctant to come to a conclusion contrary to the verdict of the jury in this case, because, recognizing the exceptional character of the panel, for integrity and intelligence, their judgment must be accorded respect as conscientiously reached and recorded, and if they erred, they are not to be blamed any more than the trial judge whose misconception of the law, in his rulings upon the evidence, contributed to a conclusion which compels him to grant a motion for a new trial.

As to Validity of Will executed by persons of advanced years or under physical infirmity, see Estate of Casey, 2 Cof. Prob. Dec. 68, and note: Estate of McGinn, 3 Cof. Prob. Dec. 26; Estate of Dolbeer, 3 Cof. Prob. Dec. 232; Estate of Brown, 5 Cof. Prob. Dec. 428.

ESTATE OF ANNIE EGAN, DECEASED.

[No. 15,650 (N. S.); June, 1914.]

Will—Competency of Executor as Witness.—The executor named in a will is not, by reason of interest, disqualified to act as an attesting witness.

Will—Competency of Testatrix—Instrument Itself as Indicating.—A will itself is an evidence which must be considered by the court as establishing the mental integrity of the testatrix.

Will—Tests of Testamentary Capacity.—If a testator has sufficient memory and intelligence fairly and rationally to comprehend the effect

of what he is doing, to appreciate his relations to the natural objects of his bounty, and understand the character and effect of the provisions of his will; if he has a reasonable understanding of the nature of the property he wishes to dispose of, and of the persons to whom and the manner in which he wishes to distribute it, and so express himself, his will is good. It is not necessary that he should act without prompting.

Will—Constituents of Testamentary Capacity.—The constituents of testamentary capacity are that the testator has an idea of the character and extent of his property, and is capable of considering the persons to whom and the manner and proportion in which he wishes his property to go.

Will—Capacity of Testatrix Established.—The testatrix in this case responds to the foregoing conditions. She was competent to make her will and was free from undue influence.

James M. Hanley, for contestants, Eugene P. Egan and others, sons and daughters of decedent.

Emilio Lastreto, for Catherine McCarthy, proponent, daughter.

Timothy J. Crowley, of counsel.

COFFEY, J. In all this class of cases there appears some reason for the institution of a contest, as naturally the kin not favored by the testatrix finds occasion for complaint as to the invidious disposition of the ancestral estate, as in this case, according to counsel for contestants, every circumstance seems to show that the purported will was the handiwork of the daughter Catherine, the proponent.

That is the contention, and certainly there are circumstances that appear to support this conclusion.

It is a case which might justify an appeal to a legislature to abrogate the statute of wills and to deny an ancestor any right of testamentary disposition; but so long as the statute survives courts must be bound by its provisions, and among them is one which allows arbitrarily the ancestor, if of sound mind and free from undue influences, to dispose of property as he may.

The criticisms of counsel for contestants as to the perfunctory manner in which wills are usually executed and attested are justified by the experience of this court. Even attorneys

who are called in as witnesses are as negligent at times and as unmindful of the solemnity of the transaction as "the man on the street" who is asked to act in a capacity for which he may be utterly unqualified. In many cases executors witness instruments in which they are to the extent of their commissions interested, and in this regard, in the opinion of this court, the law should be amended.

Persons nominated in a will as executors are disqualified as witnesses in several states, but in many states they are held competent on the ground that the commissions to which they are entitled do not constitute a benefaction, but are given as compensation for services rendered.

This has been the rule in this state.

It is difficult, however, for the common mind to discern the distinction; but in the process of technical instruction in the law, we find that education forms and informs the common mind so as to distinguish and differentiate between the species of interested persons. An executor, say, is interested to secure an office of profit; the emoluments are sometimes of consequence; frequently the executor derives more from his position than the testamentary heir.

The specific difference between the interest in the emoluments of his trust as executor and the benefaction derived from a bequest which latter would disqualify an attesting witness needs a lawyer's ken to distinguish.

It is ordinarily beyond the reach and ken of a mortal comprehension to understand it.

But we deal with the law as we find it statutorily, and that requires us to ignore the interest of an executor in maintaining an instrument which, if nullified, will deprive him of valuable perquisites.

So with the lawyer, draftsman of the testament, and frequently its attesting witness, and his associate or partner co-witness thereof.

It is difficult, indeed, to manage morally the solution of these problems.

Sometimes a precautious lawyer providently inscribes in the testament that he shall be employed by the executor as the attorney and that he shall receive a liberal fee.

That is not this case, but it is an actual case in the records of this court.

It is common for the testator to direct that the draftsman be employed as attorney and in such case it has been insisted that thereby the attorney has acquired a beneficial interest, but the supreme court has turned down that anomalous attitude of attorney to client: Estate of Ogier, 101 Cal. 381, 40 Am. St. Rep. 61, 35 Pac. 900.

It may be said that these remarks are but dicta and bear no relation to the matters in issue; and that they are irrelevant, incompetent and immaterial; but we shall see, in the course of this controversy, what is meant by this digression.

The will in this case has no symptom of a perfunctory performance. It has every element of professional precision, so elaborate, indeed, in its prophylaxis, as to suggest a suspicion that an attack was apprehended upon its validity.

From the invocation to the attestation every item is apparently safeguarded against assault.

The only challenge, however, to its validity is that at the time of its alleged execution the decedent was not of sound mind.

The will itself is an evidence which must be considered by the court as establishing the mental integrity of the testatrix.

Assuming the veracity of the draftsman and of the subscribing witnesses, of which he is one, the tests of testamentary capacity are: Did the testatrix understand what she was doing; how she was exercising her mental power; what she knew about her property; what disposition she desired to make of it; and whom should be, in the natural order, the beneficiaries of her bounty?

These are the conditions theoretically.

It is in evidence that she was a very careful and frugal woman; kept her own counsel; was extraordinarily thrifty, while not miserly, but she counted the pennies; a woman of sound sense and good judgment; the document was well considered; she was humane, affectionate and considerate for her children, especially provident for her daughters, the sons being capable of caring for themselves.

The principles are so familiar as to the constituents of testamentary capacity that it would seem almost puerile to repeat them, but familiar as they are, it seems of service, from time to time, to recite the catechism to the catechumens. In this respect, as from day to day, we go over our lessons, we are all neophytes. It is a treadmill. As Dickens phrased it, our life "is one demd horrid grind," in the probate forum.

This being said, perfunctorily and perhaps digressively, we return to the rudiments, and repeat the alphabet that "if the testator has sufficient memory and intelligence fairly and rationally to comprehend the effect of what he is doing, to appreciate his relations to the natural objects of his bounty, and understand the character and effect of the provisions of his will; if he has a reasonable understanding of the nature of the property he wishes to dispose of, and of the persons to whom and the manner in which he wishes to distribute it, and so express himself, his will is good. It is not necessary that he should act without prompting": Estate of Ingram, 1 Cof. Prob. Dec. 222.

"The constituents of testamentary capacity are that the testator has an idea of the character and extent of his property, and is capable of considering the persons to whom and the manner and proportion in which he wishes his property to go": Estate of Kershow, 2 Cof. Prob. Dec. 213.

Did the testatrix respond to these conditions? If we are to believe the draftsman and his co-witness, she was responsive to every requisite of normality at the time of attestation.

It seems that the co-witness was an attorney of many years' practice; utterly uninterested in the transaction. There were present only three persons, the draftsman, this witness, and the testatrix, and after some colloquial pleasantries, the ceremony was consummated, and the co-witness was convinced of the capacity of the consummatrix.

The draftsman testified to his part in the matter, which established that he had no other concern than as a reputable attorney called in the course of his vocation to draw the instrument at the instance of a client, the testatrix, and he discharged his duty faithfully, according to her instructions.

Everything was set down at her behest; she dictated each item; gave the reasons therefor; gave the names, ages and status of each child, descriptions of property; metes and bounds; even the macenernyized actions; the contingencies matrimonial of her daughters; all these matters were set forth with particularity and perspicacity. No detail was omitted. All was dictated to the draftsman,

It is said that she had to be reminded of names occasionally, and that she was prompted now and then, but there is nothing significant in this; even Mrs. Gertrude Donovan, née Egan, one of the executrices, not a proponent, but a contestant, says she was present at the time her mother signed the will; it was read aloud in her hearing; she was asked if she had any objection, and she said "no"; but she now contests the instrument.

The husband of this lady thinks that his mother-in-law was not sound in mind, but his reasons are not conclusive; his opportunities were scarcely sufficient to enable him to form an opinion as to her state at the time of the transaction.

Dr. Bluhm, an attending physician and surgeon, thought she was a shrewd and sensible woman; there was no symptom of unsound mind; no impairment of mental faculty; she always spoke well of her children, especially of Gertrude or "Kitty" or Catherine; there was apparently harmony in the household; this witness never suspected that there would be any occasion to question her sanity. Eleven other witnesses, intimate acquaintances, testify to her soundness of mind. A summary of their testimony is as to conversations with her; sensible and humorous; read papers and magazines and books; commented on current events, enjoyed a good story; not a taint of insanity; talked about property matters; was keen on street work, curbing and improvements generally; sound on the main question; went to church on Sundays; rational in speech; always intelligent; no change in thirty years; this is the evidence of neighbors.

Against all of this there is no sufficient evidence on the sole issue, except suggestions that she was not "right"; mere surmises and suspicions which carry no consequence of unsound-

ness of mind. So far as the court can see she was competent to make this will and it was free from any element of undue influence, although that is not an issue.

Opposition overruled. Will admitted to probate.

ESTATE OF CHARLOTTE L. WILLSON, DECEASED.

[No. 12,877 (N. S.); April, 1914.]

Wills—Interpretation of Technical Terms—Testament Drawn by Notary.—The rule of relaxation in the interpretation of technical words in a will, when the instrument has been drawn by "an unskilled hand," is here discussed in relation to a will drafted by a notary public.

Wills—Intention of Testatrix—How Ascertainable.—In interpreting paragraphs of a will the intention of the testatrix must be found in the contest, and it must accord with the law. The question is not what she meant, but what her words mean; and the intention must clearly appear to be lawful.

Wills—Direct Devise or Void Attempt to Create Trust.—A devise in this case to the executor of the will as trustee for two designated beneficiaries "and the survivor of them for and during their lifetime" (both of whom predeceased the testatrix), and thereafter to "convey and transfer" the property to certain named persons, is held not a direct devise but a void attempt to create a trust.

Wills—Meaning of Word "Children."—In the ordinary and grammatical sense the word "children" implies immediate offspring. This is its natural and primary sense.

Wills—Canons of Construction—Duty of Courts to Obey.—In interpreting wills courts are bound to carry out canons of construction, no matter how technical they may seem to those who have not studied their philosophy, and one of these rules is, most imperatively imposed, that courts must stand by the words of the will.

Wills—Interpretation—Consideration of Extrinsic Evidence.—In determining the intention of a testatrix the court can consider the circumstances surrounding the execution of the will only when inconsistencies or ambiguities in the language used make the intention as declared by the will doubtful.

Wills—Interpretation—Bequest to Children.—In construing the will in this case the court finds that the bequest to "children" in paragraphs 8 and 9 is to be construed as to a class; that it comprehends only those who were living at the death of testatrix; that there is no

ambiguity in the testamentary expression, and the intention of testatrix is therein evident; that upon the decease of testatrix there were and are now persons within the descriptive terms of the will; that the word "children" must be construed and interpreted as "immediate offspring"; and that such persons are entitled to distribution.

Charles E. Wilson, for executor, Milo S. Jeffers.

J. P. Langhorne, for William G. Hawley and others, grandnephews and grandnieces of testatrix.

Clarence G. Atwood, for Margaret S. Hayward and others, devisees.

Parker S. Maddux, for John J. Berry and others, nieces and nephews of testatrix.

COFFEY, J. Charlotte L. Willson died on the 18th of December, 1911, aged about ninety-three years, leaving a last will dated October 30, 1900, admitted to probate in this court, Milo S. Jeffers being appointed executor, and, having fulfilled his function and rendered his final account, he presents a petition for final distribution; to which the persons claiming under the will have filed their respective answers, and upon the issues thereby joined are certain important questions to be resolved which have necessitated much discussion, each of the counsel being confident of the logical and legal rectitude of his own contention and absolutely certain that his was the final word.

The questions are as to the construction of certain parts of the instrument and the shares to which the persons named therein may be entitled.

The statements of the case do not essentially differ; but in order to elucidate the points at variance and the interpretation of terms, the entire document is herein transcribed:

"IN THE NAME OF GOD, AMEN.

"I, Charlotte L. Willson of the City and County of San Francisco, State of California, being of sound and disposing mind and memory, do hereby make, publish and declare this

my last Will and testament, revoking and making null and void all other and former Wills by me heretofore made.

"First 1—I give devise and bequeath to Frances Rabe, widow of the late Dr. W. Rabe, of Oakland, Alameda County, California, the sum of Two thousand dollars.

"Second 2—I give devise and bequeath to Mrs. Margaret S. Hayward, wife of Louis Hayward of San Francisco, California the sum of Two thousand dollars.

"Third 3—I give devise and bequeath to Miss Myra S. Jeffers and Miss Eunice C. Jeffers, daughters of the late Milo S. Jeffers, of San Francisco, the sum of Two thousand dollars each.

"Fourth 4—I give devise and bequeath to William Rabe and Louise Rabe Allender, of Oakland, Alameda County, California the sum of five hundred dollars each.

"Fifth 5—I give devise and bequeath to my Executors hereinafter named as Trustees and in Trust for the uses and purposes hereinafter expressed, all that certain lot piece or parcel of land, situate lying and being in the City and County of San Francisco, California, upon which is erected a brick building known and designated as No. 110 Jackson Street, in said City and County of San Francisco, which said real property is owned by me, and the title to which stands in my name.

"The said Trustees shall during the lifetime of Fred Kuhnle and Mary E. Kuhnle his wife (and the survivor of them) of Marin County California, lease rent demise hold manage and control said property to the best of their ability and according to their best judgment and discretion.

"The said trustees shall pay out of the income derived from said property all the expenses of this trust, and of the care and management of said property including repairs, taxes, street assessments and insurance.

"During the lifetime of the said Fred Kuhnle and Mary E. Kuhnle his wife (and the survivor of them) said Executors as such Trustees shall pay to said Fred Kuhnle and Mary Kuhnle, his wife, (and the survivor of them) for their sole use and benefit and for the sole use and benefit of the survivor of them, all of the net rents income and profit of said property. Said payments to be made monthly.

"Upon the death of both of said Fred Kuhnle and Mary E. Kuhnle, said Trustees shall convey and transfer said real property to the persons designated in paragraph nine of this last Will and testament as my residuary legatees and devesees.

"Sixth 6—I give devise and bequeath to my executors hereinafter named, as trustees and in trust for the uses and purposes hereinafter expressed, that certain lot piece or parcel of land situate in the County of Marin State of California, consisting of one parcel of about four hundred and seventy-five acres, which said land was devised to me by the Will of John Ward Willson my son, and which said tract of land is now owned by me and stands of record in my name.

"That said Trustees shall pay all taxes repairs assessments and insurance on said property and shall grant and give the free use occupaney and enjoyment of the said property as a home, free of all charge and expense to the said Fred Kuhnle and Mary E. Kuhnle and the survivor of them for and during their lifetime. And upon the death of both the said Fred Kuhnle and Mary E. Kuhnle his wife said Trustees shall convey and transfer said real property absolutely to Mary S. Hayward, wife of Louis Hayward, Myra M. Jeffers and Eunice C. Jeffers, daughters of the late Milo S. Jeffers and to Allan J. Roy, son of John A. Roy, all of San Francisco California, in equal shares, share and share alike.

"Seventh 7—I give devise and bequeath to Margaret S. Hayward, Myra M. Jeffers, Eunice C. Jeffers and Allan J. Roy of San Francisco Cala in equal shares, share and share alike all those two certain lots now owned by me and standing in my name of record, situate lying and being in the City of Petaluma, Sonoma County, California.

"Eighth 8—In the case of the death of any of my devisees and legatees hereinbefore mentioned before my decease I then give the share of my estate which such devisee or legatee should have received under this Will, in equal proportions, share and share alike, to the children of my brothers George and William W. Goodrich and to the children of my sisters Eliza G. Hawley, Harriet K. Berry and Jane Augusta Berry.

"Ninth 9—I give devise and bequeath to the children of my said brothers and sisters hereinbefore mentioned all the rest,

residue and remainder of my estate of every kind, character and descripton wheresoever situate lying and being.

"Tenth 10—I hereby nominate and appoint my friends Milo S. Jeffers (nephew of the late Milo S. Jeffers), and John A. Roy of San Francisco, California, Executors and trustees of this my last Will and testament, without bonds.

"In witness whereof I have hereunto set my hand and seal this 30th thirtieth day of October, one thousand nine hundred.

"MRS. CHARLOTTE L. WILLSON.

"The foregong instrument consisting of five pages, written upon but one side of the paper, was at the date hereof signed sealed published and declared by the said Charlotte L. Willson to be her last Will and testament, in the presence of us and each of us, who, at her request and in her presence and in the presence of each other have hereunto subscribed our names as witnesses.

"A. WOLF,
"San Francisco, Cal.
"GEO. T. KNOX,
"Notary Public San Francisco, Cal."

The court will first deal with the question as to whom by the terms of the will the testatrix meant to be her beneficiaries under the paragraphs 5 and 6.

In these paragraphs testatrix devised real property to her executors in trust, giving a life estate therein to Fred Kuhnle and Mary E., his wife, and the survivor. They both predeceased testatrix.

The will was drawn by a notary, who, it is said, was not a lawyer, and some argument is founded upon this assumed fact; and the Estates of Fair and Spreckels are cited as recognizing that a will written by an unskilled hand will receive different interpretation from one drawn by able counsel.

In the Estate of Peabody the will was the work solely of the testatrix, a person unfamiliar with technical terms and unacquainted with the usual formal language of the law:

"Technical words in a will are to be taken in their technical sense, unless the context clearly indicates a contrary intention, or unless it satisfactorily appears that the will was drawn

solely by the testator, and that he was unacquainted with such technical sense."

In the case at bar the document was drawn and attested by an official who may be presumed, by virtue of his calling, to have had some knowledge of technical terms.

Counsel for beneficiaries emphasizes the point that the will here was not drawn by an able lawyer, but by a notary public, and he asks, What effect has this on the construction of the will?

If the court were permitted to indulge any allusion to judicial knowledge of local history it might be observed that the notary was a man of long experience in testamentary transactions and that he was, also, of French extraction and familiar with the forms of a country where a notary is legally the draftsman and depositary of such instruments.

Moreover, he was by profession an attorney and had practiced as such as early as 1856, when he was also a notary and continued to be so engaged for half a century in San Francisco.

George Tempest Knox was no novice as a notary or attorney when he drew this will and attested it. He had performed similar services in hundreds of instances, known to the court and of judicial record. His was a skilled hand.

But this is aside; and the contention is that, not being an able lawyer, but a mere notary, we have a different rule of construction from that which would govern if the document were the product of a professional pen.

In the Peabody case it is laid down that a technical construction of words and phrases, although prima facie the one that should prevail, will not go to the extent of defeating any obvious general intention of the testator, since wills are often prepared by those wholly unacquainted with the precise technical force of legal formulae.

As counsel says, the Peabody will was written by testatrix, who sought to create a trust, and used language for the purpose which, if used by an able lawyer, would probably have been construed as a trust to convey real property and, therefore, void under the rule in the Estate of Fair; but the court interpreted the language as a direct devise, and counsel fur-

ther says that the Fair and Spreckels cases both recognize that a will drawn by an unskilled hand will receive different interpretation from one drawn by able lawyers.

Certainly it may be said, without offense, that the supreme court verified its own remark by its decisions in the two last-named cases where upon like premises contrary conclusions were reached. In these two cases the court laid stress upon the fact that the wills were the product of skilled draftsmen, unlike the paper in the Peabody case, which came from "an unskilled hand." Counsel say, however, in the case at bar, that additional evidence that this Willson will was drawn by an unskilled hand is found in the inaccurate use of the words "devise" and "bequeath," for in each of the first four paragraphs of the will, where gifts of personal property are made, the word "devise" is used, and the word "bequeath" is used in paragraphs 5, 6 and 7, where a gift of real property is made; but the supreme court has said, in the Fair case, where a "skilled hand,"a legal artisan, so to say, drew the document, that such errors made no difference, for technical informalities, or grammatical errors, or words which, in legal language, are inapt to express the evident intention of the testator, will be construed as though the proper legal phraseology had been employed; but there must be some language used to effectuate that which a litigant asserts to have been the intention of the testator. "Of course the precise technical word devise is not necesssary; any other word or language expressive of the same action or design would be sufficient."

In this case, as in that, the direction is, in a certain event, to "convey and transfer" in the Willson will, to "transfer and convey" in the Fair will; a mere transposition of terms, with the addition here of the word "absolutely" and it is argued that this added word imports a direct devise.

If it were a matter of original impression this court would be inclined to agree with this view of counsel; but by this time it seems to be an established rule to the contrary, no matter how manifest the intention of testatrix.

This court might say that this rule is highly artificial and destructive of the design of the testatrix; but that would be

but the opinion of one judge, and there are seven finally to say "nay"; for the legal intendment is that the testatrix does not say what she means but means what she says; for the rule of technical construction is that we must stand by the words of the will. It is not what the testatrix meant, but what her words mean. It is not the spirit, but the letter; so, contrary to the scripture, the spirit is killed and the letter kept alive.

It might be conceded, as counsel contends, that it was the clear intention of testatrix that the property described in paragraph 6 should go to the persons named therein in the contingency contemplated; but the question is, Was the machinery employed adequate to execute the intention?

It was said in the Fair case that frequent invocations had been indulged in that the intention of the testator must prevail; so say we all of us, judges and lawyers and laymen; but the intention must be found in the context; and it must accord with the law. The intention must clearly appear to be lawful. This court agrees with counsel that we should not extend too far the rule of the Fair case; but it is the rule, and the trial courts must be responsive where the facts seem similar, as in this case. This is not a direct devise. The attempted trust is void.

If we assume that the questions already considered as to paragraphs 5 and 6 are correctly decided, we come next in order to 8 and 9; paragraph 7 being noncontentious.

Paragraphs 8 and 9 are short in language, but as to their meaning have led to much discussion.

The issue is presented whether the word "children" as used in the will means immediate issue or remote posterity.

Testatrix left to the children of her brothers George and William Goodrich and to the children of her sisters Eliza G. Hawley, Harriet K. Berry and Jane Augusta Berry the residue of her property.

In the ordinary and grammatical sense the word "children" implies immediate offspring.

This is its natural and primary sense.

In deeds it has been strictly so held unless there be some expressions to show a broader signification.

In wills sometimes its meaning has been extended to effect the obvious intention of the testator, so as to include grandchildren.

There should be expressions in the will to justify such a construction.

According to Webster, child means a son or daughter, a male or female descendant in the first degree; the immediate progeny.

This is the natural and primary sense. A subordinate sense is indicated in the dictionary in the use of the word, "descendants, however remote; used especially in the plural; as the children of Israel; the children of Edom."

Thus we have it that the term is descriptive and limitative of the object of testator's bounty; it is ordinarily a word of description, limited to persons standing in the same relation.

The words of a will are to be taken in their ordinary and grammatical sense, unless a clear intention to use them in another sense can be collected, and that other can be ascertained: Civil Code, sec. 1324.

Now, how are we to ascertain what the testatrix meant when she said that, in a certain contingency, she gave to the "children" of her brothers and sisters the interests indicated in her will?

It is said that there seems to be a disposition prevalent to defeat the design of a testator, but how can we learn of the design except through the language? The spirit of the law is to carry out the intention; but, it has been said, in another branch of this case, artificial means are often resorted to to pervert the testamentary purpose and divert the benefaction into a different channel.

Courts, however, are bound to carry out canons of construction, no matter how technical they may seem to those who have not studied their philosophy, and one of these rules is, most imperatively imposed, that we must stand by the words of the will.

"It is not what the testator meant but what the words mean." It is the duty of the court to find out what the words mean.

In this connection, it is said, in one of the very able arguments of counsel, that the court should lean to what is most equitable and consonant with the dictates of justice and the intentions of the testator; and, of two interpretations, that should be accepted which is most agreeable to equity, and he quotes with much force and persuasion from most eminent authorities, including Chancellor Kent and Mr. Justice Story and from other high sources.

This reduces, so far as the authorities cited and quoted are concerned, his contention to this point. Is the will susceptible of one or another interpretation?

Is it true legally, as he contends, that the term "children," as used, includes descendants in the direct lines until it reaches a resting place, however remote, on a basis of absolute equality between members of each class, the children of the members of each class forming a new class to take per stirpes, until the end of time; and that the will clearly exhibits that intention?

Does the will clearly exhibit that intention? Is there any occasion for doubt on the face of the will as to the meaning of the testatrix? In answering these questions we must always keep in sight the rule of construction furnished by our own supreme court.

Counsel contends that in construing the word "children" the court is not confined to the will itself, but can consider evidence showing the circumstances and situation of the parties and testatrix before and at the time of the execution, in order to ascertain the intention, and that these circumstances manifest that testatrix meant by the use of the word "children" the inclusion of the families and descendants of her brothers and sisters, the family or descendants of each brother and sister to take one-fifth of the estate passing under the eighth and ninth paragraphs of her will, per stirpes.

The court, in the exercise of a liberal discretion, as is its custom, in order, if possible, to reach the core of the truth, admitted certain extrinsic evidence, demonstrating great tenderness and affection on the part of testatrix toward her collateral descendants, and it is argued therefrom that the word "children" should not be rigidly or technically construed.

The reception of this testimony was tentative, and upon the assumption, subject to correction, that there was some ambiguity in the will.

If there be no such ambiguity, if the will on its surface is self-explanatory, such testimony should be disregarded in decision. The language of the instrument must control, if it be plain, definite and explicit. No matter what the court may conjecture to have been in the mind of the testatrix, it is bound by the words employed which express the intent to which effect must be given. The inquiry of the court is confined to this point. The circumstances are to be considered only when inconsistencies or ambiguities in the language used make the intention as declared by the will doubtful.

The cases in support of these elementary propositions are almost countless, and the only reason for allusion to them is in respect to counsel on either side who have shown such industry in compiling and discriminating the authorities, which the court has read and reviewed with interest inspired by the diligence of counsel.

The dispute is not devoid of difficulty; indeed, it is a matter of delicate discernment; and, therefore, the court has not hastened to a conclusion, deeming it better to be deliberate in its consideration than precipitate in its decision.

From the premises laid down the court finds:

1. That the bequest to "children" in paragraphs 8 and 9 is to be construed as to a class.

2. That it comprehends only those who were living at the death of testatrix.

3. That there is no ambiguity in the testamentary expression, and the intention of testatrix is therein evident.

4. That upon the decease of testatrix there were and are now persons within the descriptive terms of the will.

5. That the word "children" must be construed and interpreted as "immediate offspring."

6. That such persons are entitled to distribution.

Decree accordingly.

Judgment affirmed by supreme court.

ESTATE OF MARTIN BOURKE, DECEASED.

[No. 8329 (N. S.); September 19, 1910.]

Will—Invalid Trust.—A Bequest of All the Testator's Property in trust, to convert the estate into cash and keep the proceeds invested and to pay the income thereof and such portion of the principal as may be necessary "until such time as the youngest of my two said children would, if alive, have reached the age of twenty-five years, at which time the remainder of my estate shall be divided equally between my two said children, or if one be dead, then to the survivor of them," creates a trust for a term of years and is invalid, being in violation of section 716 of the Civil Code of California, as it is possible in such case that the power of alienation is suspended by limitation for a longer period than during the continuance of lives of persons in being.

Trust Void Because Discretionary.—A Trust Directing the Estate to be converted into cash and for the trustee to keep the proceeds invested and which directs that it "shall pay the income therefrom and such portion of the principal thereof in case such payment be necessary in its judgment" is void because it is discretionary and not imperative upon the trustee as to what it shall do. It substitutes the judgment of the trustee for the judgment of the testator.

Trust—Foreign Corporation must Comply With Laws to Act as Trustees.—A foreign corporation, before it can be authorized to act as a trustee of an estate in this state, must comply with all of the laws of the state of California relative to trust corporations, the same as a resident corporation.

Cullinan & Hickey, for M. J. Hynes, public administrator.

Garret W. McEnerney, for Salt Lake Security and Trust Company.

Andrew F. Burke, of counsel.

William H. Schooler, for minor heirs.

COFFEY, J. This is a case wherein an application is made on the part of the public administrator for distribution of the estate of Martin Bourke, deceased, in accordance with the provisions of the will.

Said deceased left as his heirs at law three children, viz.: Gertrude Bourke, now aged sixteen years; Margaret Bourke,

now aged fifteen years, and Frances Bourke, now aged ten years.

Margaret Caughman, the mother of said minors, and the regularly appointed guardian of the persons and estates of each of said minors, filed a demurrer to the petition of the public administrator and also a petition for distribution of said estate, one-third to Frances Bourke and two-thirds to Gertrude Bourke and Margaret Bourke, share and share alike. No provision whatever was made in the will for the child Frances Bourke and it is admitted that said child Frances Bourke is entitled to have one-third of the property of said estate distributed to her.

"When any testator omits to provide in his will for any of his children, or for the issue of any deceased child, unless it appears that such omission was intentional, such child, or the issue of such child, has the same share in the estate of the testator as if he had died intestate. . . . ": Civil Code, sec. 1307.

The specific objections urged on behalf of said minors were, that the will attempted to create a trust, which is invalid; also that the trustee mentioned in said will, being a foreign corporation, had no authority to act as trustee under the laws of this state.

The paragraph objected to in the will reads as follows:

(2) "I give, bequeath and devise unto my executor hereinafter named all my property, whether real, personal or mixed estate, wheresoever situate, IN TRUST NEVERTHELESS for the following purposes that is to say: My said executor shall, as soon as practicable after my death, convert my said estate into cash and shall keep the proceeds thereof carefully invested and shall pay the income therefrom, and such portion of the principal thereof, in case such payment be necessary in its judgment, to my children Gertrude Bourke (now aged twelve years) and Margaret Bourke (now aged eleven years) both now residing at Searchlight, Nevada, or to the survivor of them, until such time as the youngest of my two said children would, if alive, have reached the age of twenty-five years at which time the remainder of my estate shall be divided

equally between my two said children if then alive or if one be dead then to the survivor of them."

The testator attempted to create an express trust but the language used by him in his will is not such as to bring it within any of the provisions of any of the subdivisions of section 857 of the Civil Code and his having failed so to do, the trust is invalid: Vide, Bennalack v. Richards, 116 Cal. 405, 48 Pac. 622; McCurdy v. Otto, 140 Cal. 50, 73 Pac. 748; Estate of Fair, 132 Cal. 523, 84 Am. St. Rep. 70, 60 Pac. 442, 64 Pac. 1000; In re Walkerly, 108 Cal. 627, 49 Am. St. Rep. 97, 41 Pac. 772; Estate of Young, 123 Cal. 337, 55 Pac. 1011.

This will is not imperative in its terms, merely discretionary as to the amount of income which is to be paid to the minor children, Gertrude and Margaret Bourke, and in particular it substitutes the judgment of the trustee for the judgment of the testator as to how much money shall be paid for the maintenance and support of said minor children.

The testator used the following language in his will: "Shall pay the income therefrom and such portion of the principal thereof in case such payment be necessary in its judgment," it appears to me that this is purely a discretionary provision.

Under the rule as stated in the Estate of Sanford, 136 Cal. 97, 68 Pac. 494, this should be held to be an invalid trust. In that estate it was held that a trust created by law to receive the rents and profits of land until one of the beneficiaries named shall attain the age of twenty-five years and to apply the net income of the same "to such an extent, at such time or times as in their judgment may be proper" to and for the use of the beneficiaries named, is void because it was not imperative but merely discretionary as to the amount of income to be so applied.

Furthermore, the language used in said second paragraph is so uncertain that it cannot be ascertained therefrom at what time or times the income shall be paid, or how much income shall be paid to the said minors, Gertrude Bourke and Margaret Bourke.

The testator again used language which offends against the law when he stated that he desired the estate to be held by the trustee "until such time as the youngest of my two said

children would, if alive, have reached the age of twenty-five years, at which time the remainder of my estate shall be divided equally between my two said children if then alive, or if one be dead, then to the survivor of them." Neither of the minor children, Gertrude Bourke or Margaret Bourke, may ever attain to the age of twenty-five years; either one or both of them might die before attaining to the age of twenty-five years. In the event that both of said minors should die before attaining that age there would be no person in being by whom an absolute interest in possession could be conveyed and the power of alienation would be suspended by limitation for a longer period than during the continuance of lives of persons in being: Civil Code, sec. 716; Haynes v. Sherman, 117 N. Y. 433; 22 N. E. 938.

The trustee named has no capacity to act.

Counsel for the Salt Lake Security & Trust Company admit that it is a foreign corporation, being a resident of Salt Lake City, Utah, but claim that its acceptance of the trust would not constitute a "doing business" in this state. Our state constitution, article 12, section 15, provides:

"No corporation organized outside the limits of this state shall be allowed to transact business within this state on more favorable conditions than are prescribed by law to similar corporations organized under the laws of this state."

The statutes of this state require that before any corporation shall act as executor, or in any other capacity, they shall first comply with the laws of this state, such as depositing with the state treasurer securities or money to guarantee the faithful performance of their trust.

An act authorizing certain corporations to act as executor and in other capacities, and to provide for and regulate the administration of trusts by such corporations: Approved April 6, 1891, Stats. 1891, p. 490; amended April 1, 1897, Stats. 1897, p. 424; amended March 20, 1903, Stats. 1903, p. 244; amended March 18, 1905, Stats. 1905, p. 232; amended March 18, 1907, Stats. 1907, p. 562, Civil Code, sec. 290a.

The Salt Lake Security & Trust Company has not undertaken to comply with any of these laws. Before any foreign corporation can be appointed trustee of any trust in this state

it must comply with the laws of this state the same as a resident corporation.

In Walker v. Rein, 14 N. D. 608, 106 N. W. 406, the court said:

"It is only by comity, express or implied, that a foreign corporation receives recognition in the courts of any state other than that to whose laws it owes its existence. A corporation is a mere creature of the law; and inasmuch as laws have no force beyond the limits of the territory over which the law-making power has jurisdiction, it necessarily follows that when a corporation extends its operations into another state than that by force of whose laws it exists, it can demand recognition only on the principles of comity, and not as a matter of strict right. As said by Judge Story: 'Every independent community will and ought to judge for itself how far that comity ought to extend. The reasonable limitation is that it shall not suffer prejudice by its comity': Story on Conflict of Laws, sec. 244, p. 371," and cases therein cited.

The Salt Lake Security & Trust Company has no capacity to act as a trustee of any trust in this state at the present time by reason of its noncompliance with the laws of this state.

For the reasons stated, the court holds that the trust attempted to be created by the testator, Martin Bourke, in the second paragraph of said will, is void, and the petition of the public administrator for the distribution of said estate, according to the provisions of the will, is denied, and the estate of said deceased should be distributed to the heirs at law of said deceased, Gertrude Bourke, a minor, Margaret Bourke, a minor, and Frances Bourke, a minor, share and share alike. Let a decree of distribution be drawn accordingly.

ESTATE OF CHARLES M. YATES.

[No. 7454 (N. S.); March 10, 1911.]

Will.—Undue Influence is a Legal Conclusion to be deduced from facts, and these facts should be pleaded, the allegation being as positive, precise and particular as the nature of the case will allow stated in ordinary and concise language, and directed to the testamentary act.

Will.—A Mere Averment of Undue Influence as a conclusion is equivalent to the absence from the petition of anything looking to an issue of that nature.

Will—Undue Influence.—If a Petition Contains an Insufficient Allegation of undue influence, an amendment directed to curing this defect, made after the statute of limitations has attached, would be the same as a fresh petition.

Amended application to revoke probate of will and contest and opposition to probate of same.

Motions to strike out certain portions of application and contest.

Demurrer to application as to the count alleging undue influence on the ground that the cause of contest was barred by the statute of limitations, not having been set forth in the original contest, but being set forth for the first time in the amended contest filed after the expiration of the statutory year allowed for the initiation of a contest.

Lent & Humphrey, for contestant, Charles M. Yates, Jr.

M. W. McIntosh, for Lizzie Imogene Keys and others, respondents.

Stratton & Kaufman, for Mercantile Trust Company, executor, and others, respondents.

COFFEY, J. The motions to strike out should be granted for the reasons urged by the respondents.

As to the demurrers to the allegation of undue influence.

The will was admitted to probate by this court on March 31, 1909. On March 31, 1910, the contestant herein, Charles M.

Yates, filed his opposition and contest to said will and the probate thereof, on grounds of unsoundness of mind of decedent at the time of its alleged execution; failure to execute said purported will in the manner required by law, and that said will and its execution was obtained by or through undue influence exercised over and upon said testator at the very time of the making and execution of the said last will and testament of said decedent.

To this original opposition and contest, two demurrers were filed in June, 1910, one by Lizzie Imogene Keys, Ruth Keys, a minor, by Lizie Imogene Keys, her guardian, and by Roscoe Smith, named as proponents in said contest or opposition; the other demurrer was filed by the Mercantile Trust Company of San Francisco, executor of the will in question, Jessie Maud Stephens and Bartlett Stephens, a minor, by Jessie Maud Stephens, his guardian, also named as proponents in said contest or opposition. The grounds of these demurrers were, in substance, that the contest did not, as a whole, or as to any of the separate causes of opposition, state facts sufficient to constitute a ground of contest for revocation of probate of said will; the demurrer of the Mercantile Trust Company, executor, and others, further objecting that the third ground of contest—undue influence—did not state of what the alleged undue influence consisted, or by whom it was exercised.

Thereafter, pursuant to leave of court, contestant, in August 1910, filed an amended opposition or contest, in which the same grounds were alleged as in the original opposition or contest, stating of what the undue influence consisted, and by whom it was exercised.

In September, 1910, said proponents demurred to the amended opposition and contest upon the same grounds as set forth in the previous demurrers. At the same time, both groups of proponents filed motions to strike out portions of the amended opposition or contest. The portions so sought to be stricken were allegations in the undue influence count referring to certain deeds alleged in the amended contest to have been executed by decedent as the result of undue influence exerted over him by said Lizzie Imogene Keys, but which were not executed until long after the will. No point was made in

these new demurrers as to the principal ground now urged, against the amended opposition, viz., that contestant is barred from asserting the amended ground of undue influence because, as proponents claim, the amendment alleges a new cause of action.

After these last demurrers and motions to strike out had been partially argued before the court and on briefs, but not finally submitted, both groups of proponents, in October, 1910, filed amended demurrers and amended motions to strike out. These further amended demurrers and motions were in substance the same as those originally filed to the amended opposition, with the exception that said new demurrers and the new motion to strike out filed by Mercantile Trust Company et al., raised the point, that the third ground of amended opposition or contest, alleging undue influence exerted over decedent by Lizzie Imogene Keys in the execution of the will in question, and the manner in which that influence was exercised, was barred by the statute of limitations, not having been set forth in the original contest, but being set forth for the first time in the amended contest, filed after the expiration of the statutory year allowed for the initiation of contest.

The original contest as to undue influence contained no sufficient or any averment of fact. It said simply "that the said will and the execution thereof was obtained by or through undue influence exercised over and upon said testator at the very time of the making and execution of the said last will and testament of said deceased." There is no fact here alleged; no specification or suggestion of any fact which constrained testator to act contrary to his will or which induced him to execute an instrument which did not express his free intention. There is only a general statement of a conclusion of law without premises from which that deduction must be drawn. That kind of averment is fatally defective.

Undue influence is a legal conclusion to be deduced from certain facts and those facts must be pleaded. The allegation should be as positive, precise and particular as the nature of the case will allow, stated in ordinary and concise language and directed to the testamentary act; but there must, at all

events, be a specification of facts of some sort to point the conclusion of undue influence.

Unless there be such statement, the mere averment of a conclusion is equivalent to an entire absence of a contest on that issue; the space on paper occupied by it is a blank in contemplation of law and nothing can follow from it in legal judgment.

In a contest prior to probate, this omission may be supplied by what is called an "amendment" or amended contest, really a new contest, but after probate it may not be done when the term prescribed by statute for instituting a contest has expired, because when there is a total failure to make an allegation of any fact constituting a cause of action there is nothing to "amend"; amendment signifies correction or rectification of something in legal pre-existence, but in this case in the original contest there being no allegation of fact whatever there was nothing upon which an amendment could operate.

Such a so-called amendment is the same as filing a new petition after the statute of limitations had run against it.

Each count is in itself a separate complaint of contest, and although there may be three or four combined in one paper or petition, each is distinct from the others; one may be totally bad, another simply deficient, the latter may be corrected by amendment after the year, but the former, never having had legal vitality, cannot be called into existence in guise of amendment.

In other words, the failure to aver any fact constituting undue influence makes void the charge, for such a charge is in effect no complaint or ground of contest and leaves nothing to amend, and any attempted amendment coming in after the statutory period subsequent to original probate constitutes a new cause of action and is on that ground obnoxious to the demurrer interposed, which is sustained.

This is in accord with the California cases cited, as the court apprehends them.

In the Estate of Wilson, 117 Cal. 267, 49 Pac. 172, 711, decision in department, McFarland, J., said that "the part of the amendments to the Wilson written contest which set up fraud should have been stricken out, because the amendments

were made more than a year after the probate of the will, and, as the alleged fraud was a new cause of action, it could not be set up for the first time after the expiration of the year. Appellants also contend that the court erred in allowing Wilson amendments made after the year on the subject of undue influence. In the original, undue influence was charged against McConnachie, which was averred to consist in 'reporting to her false, scandalous reports concerning the conduct of the said John Wilson'; but the nature of the reports was not stated, and in the amendments it was stated what those reports were, and also that undue influence was exercised by Michael and Mary Curran. The point of appellants is, that these amendments state new matters which could not be set up after the expiration of the year. This contention of appellants cannot be maintained as to the amendments about the alleged undue influence of McConnachie; it was a mere amplification of the original charge, and may properly be considered as simply a more definite statement of what had been formerly averred. But the point must be sustained as to the averment in the amendment about the undue influence alleged to have been exercised by Michael and Mary Curran; these averments are not amendatory or explanatory, or in amplification of anything alleged in the original, but are statements of entirely new matters, constituting another and independent cause of contest, which could have been presented only within a year after the probate. Therefore, the demurrer to these should have been sustained, or they should have been stricken out or disregarded."

Temple, J., concurred; Henshaw, J., concurred in the judgment and, also, in the opinion except that he thought that: "the amendments to the charge of undue influence whereby such influence is alleged to have been exercised by Michael and Mary Curran did not add a new ground of contest."

A petition for a hearing in bank was denied, but the court modified the original opinion of Mr. Justice McFarland by striking out that part thereof which declares that the amendment to the written contest which charges undue influence on the part of Michael and Mary Curran was improperly allowed. "On further consideration we are of the opinion that the

amendment may be considered as only an amplification of the original charge on that subject."

These last remarks of the appellate tribunal do not apply to the case at bar, for in that matter there was a fact stated in the original contest to which some other facts were added in the amended contest thus amplifying or making more definite the original allegation of fact, but here we have no fact alleged originally and, hence, nothing to amplify or enlarge. The Estate of Sheppard, 149 Cal. 219, 85 Pac. 312, opinion also by Justice McFarland, fully sustains this contention.

A petition seeking the revocation of the probate of a will which contains nothing more than a general statement that undue influence was exercised over the testator, and fails to aver any facts showing that the testator was compelled to do that which was not his will to do, and which procured an instrument which did not express his free intention, does not state facts sufficient to constitute a cause of action for the revocation. In such a case, the trial court properly rendered judgment on the pleadings, dismissing the proceedings for the revocation of the probate.

ESTATE OF MARIA C. DE LAVEAGA, DECEASED.

[No. 7508 (N. S.); June 28, 1911.]

Will—Capacity to Make.—Under the Statutes of California every person over the age of eighteen years may by last will dispose of his or her estate, provided he or she is of sound mind and free from undue influence, duress, or fraud.

Will.—The Tests of Testamentary Capacity are: 1. Understanding of what the testator or testatrix is doing; 2. How he or she is doing it; 3. Knowledge of his or her property; 4. How he or she wishes to dispose of it; and 5. Who are entitled to his or her bounty.

Will—When Capacity Lacking.—It is not Enough that the testator or testatrix have a mind sufficient to comprehend one of the above elements; his or her mind must be sufficiently clear and strong to perceive the relation of the various elements to one another, and he or she must have at least a general comprehension of the whole.

Will—Immature Mental Development of Testator.—Although a person may not be subject to delusions or mental aberrations, nor suffering from active insanity nor entirely destitute of understanding, yet he or she may not have arrived at that maturity of mind which qualifies him or her to make a will and is deficient in testamentary capacity.

Will—Minimum Age Limit of Testator.—A testator or testatrix need not be expected to know the exact legal scope and bearing of his or her will, but should have sufficient faculty to understand generally his or her circumstances and natural obligations. The age of eighteen years in this state is fixed as the minimum limit at which that faculty is developed in a normal nature; in some other states and countries it is twenty-one.

Will—Mentally Undeveloped Testatrix.—A woman who has reached the age of eighteen may make a will if she be otherwise qualified, but she may have arrived at this age without having emerged in mental growth from childhood. This does not import a disordered intellect or diseased mind, and is entirely consistent with the general fact that the family of the decedent was composed of persons of sound and strong mentality, and that her inherent traits were intellectually perfect, there being no suggestion of insanity in the blood. It is also consistent with the fact that the decedent was a woman in the full bloom of health; fully nourished bodily, with no serious corporal ailment, no congenital incapacity, physically a perfect woman, but short on intellect.

Will—Evidence Willfully Suppressed Presumed to be Adverse.—It is a satisfactory presumption that evidence willfully suppressed would be adverse if produced.

Will—Presumption in Favor of—Beneficiaries Entitled to Protection. In the absence of testimony to the contrary there is a presumption in favor of the validity of a will, and the beneficiaries of a will are as much entitled to protection as any other property owners, the due execution of the will being admitted.

Will—A Will Does not Prove Itself.—Even if there be no contest of a will, certain essential facts must be established before it is admitted, and these facts should be carefully inquired into on the original probate. In all cases of olographic wills the handwriting must be proved affirmatively by or on behalf of the proponent.

Will—Contest—Evidence—Burden of Proof.—While it would be incumbent on the proponent, if there were no contest, in a case such as the one at bar, to establish the authenticity of the handwriting of the decedent in the will, which is holographic, and the circumstances of the execution of the document to the extent of her knowledge, yet it is true, in a sense, that the burden of proof rests upon the contestant and he must bear his own burdens as to the issues set up by him; and where it is not denied that the instrument is in the handwriting

of decedent, so far as the contest is concerned, it is incumbent upon him to prove a negative, that she was not competent; that the will was not the voluntary emanation of her own mind, or that she was not free from circumstance of constraint. Any one of these facts established justifies the contest, but does not relieve the proponent ultimately from her burden of establishing all the elements necessary to entitle her to letters testamentary.

Will.—A Holographic Will must be Proved in the Same Manner as other private writings; that is, by one who saw the writing executed or by evidence of the genuineness of the handwriting of the maker, or by a subscribing witness.

Will Contest—Issues—Unsoundness of Mind and Undue Influence—Consistency of Issues.—In a will contest the issues of unsoundness of mind of the testatrix and undue influence exerted upon her are not inconsistent. While these issues are distinct as a rule, there may be a case where a person of immature intellect may be so influenced by one of superior power as to direct the manual performance of the mechanical act.

Will Contest—Evidence—Circumstances Before and After Admissible.—In such a case, the evidence should not be confined to the point of time of the testamentary act alone; it is proper to allude to the surroundings of the decedent at the time of making the will and for the years prior and subsequent thereto.

Will Contest—Evidence—Credibility of Witnesses.—In such a case, in determining the credibility of witnesses who testify as to the mental competency of the testatrix, their opportunities, their intimacies, their relations to the parties, and many other major and minor elements, must be considered before accepting as absolute their opinions upon a matter of such moment as the mentality of a person.

Will—Testamentary Capacity—Ability to Speak Several Languages. The fact that the testatrix in such a case was able to speak in several languages is not in itself proof of intellectual power.

Will—Mental Capacity—Undue Influence—Justness of Will.—While, if the testatrix be of sound mind, it matters not whether her will be equitable or inequitable, just or unjust, as she has the right to do as she pleases with her property, nevertheless, equity, justice, the relations of the parties, the surroundings of those benefited in connection with the testatrix and other points may be considered in connection with the transaction, where the competency is questioned or susceptibility to influence suggested.

Will—Mental Capacity—Undue Influence—Ignoring Benefactor.—In such a case the improbability of a person ignoring or discriminating against one who has been of great service to her for many years and who had conserved her estate without the diminution of a dollar, on the contrary with increase and without retaining anything for per-

sonal benefit, is a proper subject of inquiry, as to whether if she were of full faculty and free from the impediment of influence she would have done otherwise; and it might be inferable that those who had been in close propinquity and who were the beneficiaries of her bounty had improved their opportunities to their own advantage.

Will—Mental Capacity—Ability of Testatrix to Write.—The mere fact that one can write does not imply soundness of mind; and in a case like the one at bar the circumstances must be considered and inquiry made into all the facts and history, and the conduct and surroundings of the person whose mental condition is at issue, before passing judgment.

Will Denied Probate.—It is Held in This Case that the paper propounded should be refused and denied probate.

Application for probate of will; contest.

Timothy J. Lyons, for proponent, Maria Josefa Cebrian.

Pillsbury, Madison & Sutro, for contestant, Miguel A. de Laveaga.

Counsel appearing at hearing of contest and trial of issues:

E. S. Pillsbury and Oscar Sutro, for contestant.

Timothy J. Lyons, Peter F. Dunne, Samuel M. Shortridge, for Maria Josefa Cebrian, as proponent and respondent and executrix under the will, and also as heir, devisee and legatee and trustee, and also for others named in the will as devisees and legatees, respondents to the contest.

COFFEY, J. On March 29, 1909, came into court M. A. de Laveaga having filed his petition alleging that he was, and had been for many years, a citizen and resident of the state of California; that Maria C. de Laveaga died in the city of Madrid, Kingdom of Spain, on or about the 4th day of February, 1909, and that at the time of her death she was a resident of the city and county of San Francisco, state of California, but was temporarily residing in said kingdom of Spain; that she died leaving real and personal property in the city and county of San Francisco, state of California;

that she left as next of kin and heirs at law the following, and none others, namely: M. A. de Laveaga, over the age of twenty-one years, surviving brother; and Maria J. Cebrian, wife of J. C. Cebrian, residing in the city and county of San Francisco, California, over the age of twenty-one years, surviving sister.

Petitioner averred that he was informed that said decedent died leaving a will in which he was named and appointed as executor without bonds, but that the said alleged will, if in existence, is not in his custody and possession, and has never been seen by him, and cannot at the present time be obtained by him; that the property and estate left by her in San Francisco and elsewhere in California needs the care and attention of an administrator and that a considerable delay will ensue before the granting of letters testamentary, or letters of administration, as the case may be, he believes and therefore alleges, that as her surviving brother and as the person nominated in her will, if the same should exist, he is entitled to special letters of administration on her estate, to collect and take charge of her estate, exercise such other powers as may be necessary for the preservation of said estate.

Wherefore, he prayed that upon the filing of this petition, the court would give and make its order appointing him special administrator of her estate and order that special letters issue to him upon his giving bonds in such sum as the court may direct and upon taking the oath in accordance with law.

GRANTING OF SPECIAL LETTERS.

Upon this petition evidence having been introduced and submitted in support thereof, and the matter having been fully heard and submitted, it was determined that its allegations were true and correct, and petitioner was appointed special administrator of the estate of deceased and letters ordered issued upon filing a bond in the sum of five thousand dollars.

The special administrator thereupon immediately qualified and entered upon his duties.

PETITION FOR PROBATE BY MARIA JOSEFA CEBRIAN.

On June 12, 1909, Maria Josefa Cebrian filed a petition in which she alleged that she was and had been for more than forty years a resident of and domiciled in the city and county of San Francisco, state of California, and was a citizen thereof; that Maria C. de Laveaga, also called Maria Concepcion de Laveaga, also called M. C. de Laveaga, died on the 4th day of February, 1909, in the city of Madrid, Kingdom of Spain, Europe, while temporarily absent from the place of her residence and domicile; that said decedent was at the time and date of her death and for more than forty years immediately preceding said date had been, continuously, a resident of and domiciled in the aforesaid city and county of San Francisco, state of California; that said decedent left estate, consisting of both real and personal property, situate in said city of San Francisco, state of California, the probable value and character of which are as follows, to wit:

(a) Various parcels of land (ten or twelve or more parcels) situated in San Francisco, some improved and some unimproved, the details or particular descriptions thereof, your petitioner is unable to set forth at this time; (b) An undivided one-third interest in the Rancho "Quien Sabe," situate in San Benito county, said state; and (c) An undivided one-third interest in a town lot in Coronado, San Diego county, said state. Also (d) bonds, negotiable securities, shares of stocks of corporations, promissory notes and other personal properties, the details or more particular description of which your petitioner is unable to set forth at this time; that the probable aggregate value of the aforesaid real properties of said decedent in the said state of California is the sum of one million dollars and upward, or thereabouts; and that the probable aggregate value of the aforesaid personal properties of said decedent, in said state, as petitioner is informed, and therefore alleges, is the sum of one million dollars and upward, or thereabouts; and that the whole estate of said decedent, real and personal, in the state of California, is of the value of two million dollars and upward, or thereabouts; that there is also some real estate in the Republic of Mexico, belonging to said decedent, the description or prob-

able value of which your petitioner is unable to set forth at this time.

Petitioner further alleged that the decedent left a last will and testament, dated San Francisco, California, the fifteenth day of February, 1893, which the petitioner believed and therefore alleged to be the last will and testament of said deceased, and which she produced and presented and filed with the petition; that said will was by said decedent, in her lifetime delivered to, and left in the possession of petitioner, but that at the time of the death of said decedent, the petitioner was absent from her home and residence in San Francisco and was sojourning in the Kingdom of Spain, and continued absent from her home and said residence until the month of May, 1909, and therefore the petitioner was not able to search for said will until her return to her said home and residence in the month of May, 1909, whereupon, after the search therefor, the same was found by petitioner on May 23, 1909; that said will was olographic in form and is entirely written, dated and signed by the hand of testatrix herself; the said Maria C. de Laveaga, also called Maria Concepcion de Laveaga, also called M. C. de Laveaga, the said testatrix signing and subscribing the said will by her name and signature "Maria C. de Laveaga"; that at the time the said will was executed by said decedent, to wit: it was entirely written, dated and signed by hand of testatrix herself, and on the day it bears date, namely, the fifteenth day of February, eighteen hundred and ninety-three (1893) the said decedent and testatrix was over the age of eighteen (18) years and was of the age of thirty-two (32) years, and was of sound and disposing mind; that the said will is entirely written and dated in the Spanish language, the native language of the testatrix, and a true, correct photograph and photographic copy of said will so entirely written, dated and signed on a single page of paper is annexed to petition and made a part thereof; that a true, full and correct translation of said will, from the said Spanish language, in which it is written, into the English language, is annexed to the petition and made a part thereof; that the names, ages and residences of the

legatees and devisees of said decedent, under said last will and testament are as follows, to wit:

(a) Miguel A. de Laveaga (also called M. A. de Laveaga), surviving brother of said decedent (testatrix), aged upwards of twenty-one years, residing in Contra Costa county, said state, (postoffice address R. F. D. No. 1, Box 61, Berkeley, in said county), designated and referred to in said will as "my brother Miguel" (translation);

(b) Maria Josefa Cebrian (wife of John C. Cebrian), surviving sister of said decedent, (testatrix), aged upward of twenty-one years, residing in said San Francisco, California, designated and referred to in said will as "my sister Pepa" (translation);

(c) The three children of Miguel A. de Laveaga, the surviving brother of said decedent and testatrix, namely: J. V. de Laveaga, aged upward of twenty-one years, residing at Menlo Park, San Mateo county, said state of California; Julia de Laveaga Welch (wife of Andrew Welch), aged upward of twenty-one years, residing at San Mateo, San Mateo county, said state of California; and Edward I. de Laveaga, aged upward of twenty-one years, residing in Contra Costa county, said state of California (postoffice address R. F. D. No. 1, Box 61, Berkeley). The said three last named persons being the children of "my brother Miguel" referred to in that certain language of the said will, to wit: "to my brother Miguel or to his children" (translation);

(d) The three children of Clemente Laveaga (a first cousin of testatrix) namely: Ignacia Laveaga, aged upward of twenty-one years, residing in Mazatlan, Republic of Mexico; Maria Laveaga de Canobbio, aged upward of twenty-one years, residing at Mazatlan, aforesaid; and Guillermo Laveaga, aged upward of twenty-one years, residing at San Ignacio, state of Sinaloa, Republic of Mexico; the said three last named persons being designated and referred to in said will as "Clemente's children" (translation);

(e) Maria Cebrian de F. de Caleya (wife of F. de Caleya), a niece of said decedent (testatrix), of the age of majority, residing in Santander, Kingdom of Spain, being the person "Mimi" Cebrian, referred to in that certain language of the

said will, to wit: "my nieces Mimi and Pepita Cebrian" (translation);

(f) Josephine de L. Cebrian, a niece of said decedent (testatrix), of the age of majority, residing in said San Francisco, California, being the person "Pepita Cebrian," referred to in that certain language of the said will, to wit: "my nieces Mimi and Pepita Cebrian" (translation);

(g) The eight children of Maria Josefa Cebrian (aforesaid), the surviving sister of said decedent and testatrix, namely: Maria Cebrian de F. Caleya (wife of F. de Caleya), age and residence as hereinabove stated; Josephine de L. Cebrian, age and residence as hereinabove stated; Edward de L. Cebrian, aged 24 years, residing at said San Francisco, California; Louis de L. Cebrian, aged 22 years, residing at said San Francisco; Harry de L. Cebrian, aged 21 years, residing at said San Francisco; Raphael de L. Cebrian, aged 19 years, residing at said San Francisco (with his parents); Isabel Cebrian, aged 12 years, residing at said San Francisco (with her parents); and Beatrice Cebrian, aged 11 years, residing at said San Francisco (with her parents). The said eight last named persons being the children of "my sister Pepa," referred to in that certain language of the said will, to wit: "to my sister Pepa or to her children" (translation).

That the decedent testatrix was never married, and left her surviving neither father nor mother, nor any brother or sister, excepting the brother and sister referred to in the will and already named, nor any child or issue of any deceased brother or deceased sister, and that the next of kin of decedent testatrix who survived her, and who are her sole heirs at law, are the said brother and sister as already named. That the petitioner Maria Josefa Cebrian is named and nominated in said will as executrix thereof, and Miguel A. de Laveaga is nominated as executor thereof, they being the persons designated in the clause and language of the will reading as follows in the translation: "I nominate executor and executrix my brother Miguel and my sister Pepa without bonds." That the petitioner accepts the aforesaid nomination of her by said testatrix and consents to act as said execu-

trix of said will and hereby accepts the trust; that the petitioner is unable to state whether or not Miguel A. de Laveaga, aforesaid, who is nominated in said will as executor consents to act as such executor or renounces his right to letters testamentary, although inquiry in that behalf has been made by her, and he has had a copy of the will since or before May 24, 1909, a copy having been forwarded to him by her; and that he has not been and is not now absent from the state of California, but resides in an adjoining county within a short distance from said San Francisco.

Wherefore the petitioner Maria Josefa Cebrian prays the court that after proper proceeding as provided by law the said instrument be admitted to probate as the last will and testament of said decedent, and that the court find and determine what is the true, full and correct translation of said last will from the Spanish language, in which it is written, into the English language, and that upon the admission to probate of said will, she be appointed executrix thereof without bonds, and that letters testamentary be issued to her.

The original will in Spanish is as follows, the translation following:

"In the name of God, Amen.

"I, Maria C. de Laveaga, declare that this is my testament.

"I leave (bequeath) to my brother Miguel or to his children Eighty Thousand Dollars.

"I leave (bequeath) to my sister Pepa Five Thousand Dollars for alms, and One Thousand Dollars for masses, and Fifteen Thousand Dollars for Clemente's children.

"I leave (bequeath) to my nieces Mimi and Pepita Cebrian my wearing apparel, furniture and jewelry.

"I leave (bequeath) all the rest of what I possess to my sister Pepa or to her children, if she does not survive me.

"I nominate executor and executrix my brother Miguel and my sister Pepa, without bonds.

"And I sign it in San Francisco, California, the 15th day of February, 1893.

"MARIA C. DE LAVEAGA."

On July 12, 1909, Miguel A. de Laveaga filed a contest of and objections to this instrument in which are set forth, as grounds and objections to admission to probate of said instrument:

(1) That the said Maria C. de Laveaga left surviving her, her sister, Maria Josefa Cebrian, over the age of twenty-one years, and a resident of San Francisco, California, the petitioner in the petition filed herein on the 12th day of June, 1909, for the probate of the instrument filed herein on said day purporting to be the last will of the decedent, and her brother, Miguel A. de Laveaga, over the age of twenty-one years, and a resident of the county of Contra Costa, California, who is this contestant; that the decedent was never married, and left her surviving no issue, and neither father nor mother, nor any brother or sister, excepting as hereinbefore set forth, nor any child or issue of any deceased brother or sister, and the said Maria Josefa Cebrian and this contestant are the sole heirs at law of said decedent; that on the 15th day of February, 1893, the date of the purported will of said decedent, filed herein as aforesaid, and at the time the said Maria C. de Laveaga executed said purported will, if the same was ever executed by her in form or otherwise, she was not of sound mind and was not competent to make a last will.

(2) That on said 15th day of February, 1893, and at the time of the execution in form of said purported will, if the same was ever executed by Maria C. de Laveaga at all, she was not free from undue influence; that from her birth, in or about the year 1856, and continuously thereafter until said 15th day of February, 1893, and to the time of the alleged execution of said will, she was weak in mind and incompetent and incapable of taking care of herself, or of her property; that the execution in form of said purported will was procured by undue influence and the facts constituting said undue influence are as follows:

From the time of her birth, and continuously thereafter to the time of the execution in form of said purported will, if the same was executed by said decedent, said decedent was

weak in mind and unable to knowingly understand the ordinary affairs of life, or to understand or transact business, and, owing to the said condition of decedent's mind, during all of said time she was incapable of properly taking care of herself, and was in constant need of the care and attention of some other person to see that her wants were properly administered to, and during all of said period resided with and was taken care of by persons upon whom said decedent was entirely dependent for the care and attention of herself and her affairs; that persons, the names of whom are unknown to this contestant, well knowing the incompetent and weak state of the mind of said decedent, caused her, by influence, persuasion and machinations, to so execute said instrument, if the same was executed by her at all, for the fraudulent and wicked purpose of causing her to devise and bequeath the greater portion of her estate to her sister Maria Josefa Cebrian; that by reason of the said mental condition of said decedent, decedent yielded to the persuasion, influence and dictation of said persons, who caused decedent to write said purported will hereinbefore referred to, or part thereof, if decedent wrote the same at all, or any part thereof; that by reason of her condition of mind as aforesaid, on the 15th day of February, 1893, and at the time of the execution in form of said purported will, if the same was executed by said decedent at all, said decedent was completely dominated by said persons whose names are unknown to this contestant, and was unable to resist the said undue influence of said persons, and was unable to resist the dictation, persuasion and control of said persons, and solely by reason of said influence and of said dictation and control, the said decedent, as aforesaid, did in form make and execute said purported will, if the same was ever or at all made and executed by her; that if said decedent had been free from the influence, persuasion, dictation and control of said persons, she would not in form or otherwise have made or executed said purported will.

(3) That on the 15th day of February, 1893, and at the time of the execution in form of said purported will, if the same was executed by said Maria C. de Laveaga at all, she, the said Maria C. de Laveaga was not free from duress or

fraud; that from her birth, in or about the year 1856, and continuously thereafter to the time of the execution in form of said decedent, Maria C. de Laveaga, was weak in mind and incompetent and incapable of taking care of herself, or of her property; that the execution in form of said purported will, if the same was executed by the said Maria C. de Laveaga at all, was procured by duress and fraud, and the facts constituting such duress and fraud are as follows: From the time of her birth, and continuously thereafter to the time of such execution in form of said purported will, if the same was executed by said decedent, said decedent was weak in mind and unable to knowingly understand the ordinary affairs of life, or to understand or transact business, and, owing to the said condition of decedent's mind, was, during all of said time, incapable of properly taking care of herself, and was in constant need of the care and attention of some other person to see that her wants were properly administered to, and during all of said period resided with and was taken care of by persons upon whom said decedent was entirely dependent for the care and attention of herself and her affairs; that certain persons, the names of whom are unknown to this contestant, did at the time that said decedent did in form execute said purported will, if the same was executed by her at all, fraudulently and wickedly scheme and conspire to cause said decedent to bequeath and devise the greater portion of her estate to her sister, Maria Josefa Cebrian, and for that purpose did fraudulently entice and induce said decedent in form to make and execute said purported will, and did at said time, by duress, to wit: threat and by the exercise of pretended compulsion, which said decedent, owing to her said weak and incompetent state of mind, believed herself unable to resist, cause said decedent in form to execute said purported will, if the same was executed by her at all; that at the time said persons induced said decedent in form to execute said purported will, said persons well knew the mental condition of said decedent, and well knew that said decedent was incompetent and weak in mind, and, therefore, unable to make a will, and well knew that said decedent could not resist the duress exercised by said persons; that solely by reason of the

mental condition of said decedent, said decedent was easily induced by said persons in form to execute said purported will, if the same was executed by said decedent at all, and yielded to the fraud and duress of said persons in inducing and causing said decedent in form to execute said purported will, if she executed the same at all; that if said persons had not exercised said duress and fraud, said decedent would not have in form executed said purported will, if she executed the same at all.

Wherefore, the said contestant prayed that the said instrument be refused and denied probate.

THE ISSUES SIMPLIFIED.

All of these grounds of opposition and contest were traversed by proponent and respondent in their several capacities, and the issues thus joined came to trial before the court, a jury having been waived, on October 27, 1909, being finally submitted for decision February 20, 1911.

Reduced to simple terms the issues are that the decedent was at the date of the will of unsound mind, incompetent to make a will, and by reason of her mental condition unable to understand the mechanical act by which in form she disposed of her property, and that said act was not hers in law but that of others who directed, dictated and dominated the manual performance.

It is charged, in support of the allegation of unsoundness of mind, that she never arrived at an age of mental maturity, not that she was a lunatic or dangerously insane, but that, in contemplation of law, she never reached the period of testamentary capacity.

Under our statute every person over the age of eighteen years may by last will dispose of all his estate. The age of eighteen years, therefore, is the initiation of the period of testamentary capacity in either sex. If one has not attained that age no will can be made. The testator must be over that age and of sound mind and free from undue influence, duress or fraud.

TESTS OF TESTAMENTARY CAPACITY.

The tests of testamentary capacity are: (1) Understanding of what the testatrix is doing; (2) how she is doing it;

(3) knowledge of her property; (4) how she wishes to dispose of it; (5) who are entitled to her bounty.

She should have strength and clearness of mind and memory sufficient to know in general, without prompting, the nature and extent of the property of which she is about to dispose, the nature of the act which she is about to perform, and the names and identity of the persons who are the proper objects of her bounty, and her relation toward them.

In order to have a sound and disposing mind the testatrix must be able to undestand the nature of the act she is performing, she must be able to recall those who are the natural objects of her bounty, she must be able to remember the character and extent of her property, she must be able to understand the manner in which she wishes to distribute it, and she must understand the persons to whom she wishes to distribute it. It is not enough that she have a mind sufficient to comprehend one of these elements; her mind must be sufficiently clear and strong to perceive the relation of the various elements to one another, and she must have at least a general comprehension of the whole.

CONTENTION OF CONTESTANT.

This is not a case of delusions or mental aberrations. Active insanity is not charged. It is not claimed that decedent was entirely destitute of understanding, but that she was deficient in testamentary capacity. This is the contention of the contestant, that the decedent had not arrived at that maturity of mind which qualified her to make a will; to that extent she was unsound in mind; and that was her mental condition on February 15, 1893, the date of the document in dispute.

The exact age of decedent was a matter of minor contention, the birth certificate indicated December 29, 1856, but this is of small concern, for it sufficiently appears that she became of legal age during the course of administration of her father's estate in 1874–75. There appears, however, to have been some doubt upon this point, as to her age, which, it is asserted, led to impressions among her acquaintances that she was very much younger than she really was, tending to

bear out the argument that she was not fully developed mentally, not that she was an idiot, or insane, or a maniac, but that she was a child all her life whose mentality had been in some way arrested at an early age; that she had never grown up intellectually; her condition was that of passive incompetency; never attaining intellectual adequacy to comprehend the circumstances essential to the making of a valid will as in the case of an adult.

A PREVALENT LAY IMPRESSION CORRECTED.

It is a very prevalent lay impression on this point that the mind must be perfectly sound to make a will, but our supreme court has established the rule that such an exalted standard of intellect is not requisite; that a testatrix need not be expected to know the exact legal scope and bearing of her will, but that she should have sufficient faculty to understand generally her circumstances and natural obligations. The age of eighteen years in this state is fixed as the minimum limit at which that faculty is developed in a normal nature; in some other states and countries it is twenty-one, but here, other things being equal, one is supposed to be capable upon attaining the eighteenth year.

Having accomplished that period, if she be otherwise qualified, she may make her will. In the order of time, however, she may have arrived at majority without having emerged in mental growth from childhood; at eighteen in the sequence of years she may be only eight in the process of intellectual evolution. This does not import a disordered intellect or diseased mind; it is merely, perhaps, a mysterious dispensation of Providence in an individual or isolated instance, entirely consistent with the general fact, as is claimed here by proponent, that the family of the decedent was composed of persons of sound and strong mentality, and that her inherent traits were intellectually perfect, there being no suggestion of insanity in the blood. It is also consistent with the claim that the decedent was a woman in the full bloom of health; fully nourished bodily, with no serious corporal ailment, no indication of congenital incapacity; physically "a perfect woman nobly planned"; yet somewhat short on intel-

lect. The taint of insanity imputed to her aunt Trinidad may be unjustified, although Mrs. Cebrian testifies that Trinidad was delicate and dyspeptic, had partial paralysis and dwelt in a sort of semi-seclusion on account of her infirmities, had her meals in her room, and Mrs. Cebrian was the one that was most of the time with her; and it may be assumed that there is no showing of insanity in this family; yet this is not like the ordinary cases of unsoundness of mind; although it is not unusual that in families of average normality there may be deviations from the highest to the lowest type, from supreme efficiency to almost absolute deficiency. It is not uncommon in large families to find among the children very varying degrees of mental, moral and physical power, diverse dispositions and differing inclinations, sometimes as many differences in these respects as there are children; some alert, active, ambitious, diligent, energetic, intellectual, studious, industrious, thrifty; others inert, indolent, improvident, volatile, incapable of cultivation; indisposed to mental exertion; some high-strung, sensitive, sanguine, self-reliant and confident in their capacity to engage in enterprise, bright, daring and masterful; others lacking in these qualities and marked for meekness, diffidence, docility, timidity, susceptibility, dependence, humility, modesty, charity, piety and other amiable attributes and qualities. All varieties of these characteristics may be found grouped in a single family. Instances almost innumerable might be cited where the strength of the family was concentrated in some one member sometimes the eldest, again the youngest, or another; and others moderate in endowment, feeble or even imbecile in intellect. History is replete with examples and numerous local illustrations might be given without going beyond the records of this court.

The most contrary manifestations of character are exhibited by children reared under most favorable conditions. We find some consumed by cupidity, "metalized," avaricious, although possessed of wealth beyond the dreams of avarice, always thirsting for more; for, it is said, the love of pelf increases with the pelf, and poverty wants much, but avarice everything, and blinded by this vice its victims live only to increase their store. Others again benevolent, generous

prodigal, careless of the future. Under the same roof, educated under the same auspices, with every advantage of domestic and foreign culture, trained by the same parents, themselves examples of the cardinal virtues, we discover in their offspring dissimilar traits, none of them necessarily vicious, but still symptomatic of individual idiosyncrasies and opposing tendencies and temperamental tangents. How to reconcile these incongruities is not the province of the court; to note them suffices for the present.

FAMILY HISTORY OF DECEDENT.

Decedent was born in 1856 and came from Mexico with her parents to San Francisco in April, 1867. There were six children in the family at that time, three sons and three daughters, two of the former, José Vicente, junior, and Miguel A., were then in Europe for education, as José Maria had been also for a time, returning in 1862 to Mazatlan, whence he came with his sisters, Maria Ygnacia, Maria Josefa and Maria Concepcion, and his parents, Don José Vincente de Laveaga and Doña Dolores Aguirre de Laveaga. The eldest child, José Vicente, junior, was born August 10, 1844; he died unmarried in California in August, 1894; the second, José Maria, born in 1845, died unmarried in Denver, Colorado, April, 1880; the third child, a daughter, Maria Ygnacia, commonly called "Ignacia," "Nacha," or "Nachita," the diminutive for the full name, born in September, 1847, died in Rome, Italy, February, 1888; the fourth child, Miguel A., the contestant here, was born in March, 1848; the fifth, Maria Josefa, now Mrs. Cebrian, known in the family circle as "Josefa" or "Pepa," the proponent here, born in October, 1855; the last in sequence of birth was Maria Concepcion, the testatrix, born in December, 1856, who died unmarried in Madrid, February 4, 1909. The contestant Miguel and the proponent Maria Josefa Cebrian are the only surviving children.

The absent sons, José Vicente and Miguel, returned from Europe, the former in 1868 and the latter in 1869, and thereafter remained with the family. The respective ages of the other children at the time of the arrival in San Francisco in

1867 were: José Maria, 22 years; Maria Ygnacia, 20; Maria Josefa, 12, and Maria Concepcion, 11 years. In the household there were two maiden sisters of the mother, Isabel and Trinidad Aguirre, who remained as members of the family until their death. In addition there were the necessary domestic servants and attendants. Upon his arrival here the senior Don José Vicente repaired to a house selected on Silver street, where he remained with his family until he moved to 512 Dupont street, near California, thence after a few months to 1115 Stockton street, near Pacific street, where he made his local habitation until he died in 1874. After his decease his widow purchased the dwelling-house 322 Geary street, near the present Hotel St. Francis. She lived there until her decease in 1882. This domicile she devised to the use of her daughters who should remain single in order that with its furniture it should serve as an abode for them, subject to the burden of taxation; in case of their marriage or death unmarried, the value of the property to be divided among the other heirs. In this residence these two daughters lived from 1882 to 1884, when they went to Europe, Ygnacia dying there in 1887.

PRECATORY PROVISIONS OF MOTHER'S WILL IN REGARD TO FAMILY AFFAIRS AND SPECIAL CARE OF MARIA.

During this period Ignacia had the personal care and control of Maria, pursuant, it should seem to the terms of the mother's will, dated December 15, 1881, which set apart the fifth of her estate to charity, and the remaining four-fifths in equal shares to the children surviving, José Maria having died prior to that date. All the surviving children, save Maria Concepcion, who was then twenty-four years of age, were named as executors and executrices. The instrument was written in Spanish. In this document, after the dispository provisions, are these clauses as translated:

"Fifth. For the execution of all the dispositions contained in this, my testament, or any codicil in case I leave one, I name for my executors my four children, Maria Ignacia, Miguel Anstacio, José Vicente and Maria Josefa; and in case the law prevents the last from being an executor, I name as the fourth

executor, in place of said Maria Josefa, her husband, J. C. Cebrian; and each of said executors jointly and severally I release of all bonds or securities which are required by law.

"Sixth. I charge and implore my heirs and executors that they shall do everything possible to avoid lawsuits and all manner of judicial proceedings, because these are prejudicial to the tranquillity of families and ruinous of their interest; but in case of any unadjustable difference, they can submit it to the decision of arbitrators or friendly adjusters who shall name a person of probity, love and reliability. Further, I charge, desire and ordain that in the divisions of my estate none of my children shall seek any advantage over the others, and that no account shall be made if some have spent more than others while I was living, since this is my will, as is everything which I ordain in this, my testament.

"Seventh. Most fervently I charge my said executors with the care and protection of their younger sister, Maria Concepcion as long as she may live."

THE FATHER'S WILL AND ITS ADMONITIONS AND REFERENCE TO A "MEMORIA."

The sixth clause is a repetition of the admonition contained in the seventeenth paragraph of the senior Don José Vicente's will to avoid all litigation. In the father's will executed September 27, 1873, which, according to its final statement, occupied in its composition, from commencement to conclusion, five years, and was written slowly in the hand of the testator, although regularly attested, he enumerates his children, "the first four of legal age and the last two still minors, since Maria Josefa will complete her seventeenth year and Maria Concepcion her fifteenth year at the end of the present year, 1872." In the seventeenth clause he admonishes his heirs, their tutors, guardians and executors to avoid litigation and in the eighteenth clause he names his executors:

"For the purpose of complying with and paying everything contained in this, my will, and all of what may be contained in the memoria, which, with a date previous to this, may appear written in my hand, or a codicil, in the case of leaving one or other or both, I name for my testamentary

executors, in the first place, my wife, Doña Dolores Aguirre; second, my daughter, Maria Ignacia; third, my son, José Vicente: and fourth, my son, Miguel Austacio, jointly, relieving them of the bond which the law requires. I confer upon them ample power to the end that immediately upon my death they may take possession of my property, comply with and pay out everything contained in this, my will, within the legal term or outside of it (with such additional time as may be necessary for its prorogation) (and if they need more time I now allow it to them.)"

The twenty-first clause is as follows:

"And by means of the present I revoke and annul all testaments which previous to this I have formulated, which are many, and the last previous to this was in the year 1865, those which may have been made by word of mouth, or in any other form, to the end that no one of them may be of value or be effective in court of law or outside of it, except this testament and memoria or codcil which may appear at my death, but that the memoria must be written in my hand, although, as I have said, it may be dated previous to this testament, which I desire and command to be carried out in all its parts, as is my will, or by whatever means may be most secure and according to law."

THE INCEPTION OF THE LITIGATION OF ANSELMO, NATURAL SON OF JOSÉ MARIA, RECOGNIZED IN HIS WILL AS SUCH.

He died on March 14, 1874, and the will came into course of probate and administration in that and the following year, during which time Maria Concepcion became of age. It is claimed here that the "memoria" alluded to in the father's will was a practical declaration and determination of the incompetency of Maria Concepcion. The executors named in the will were primarily, the widow; second, the daughter, Maria Ignacia; third, the son, José Vicente; fourth, the son, Miguel Austacio, all jointly. Certain obligations were cast upon them in the seventeenth clause as "tutors, guardians and executors," and in this eighteenth clause they are named executors for the purpose of complying with and paying everything contained in the will, "and all of what may be

contained in the memoria, which, with a date previous to this may appear written in my hand."

No such written document as this memoria, nor any codicil, appears in evidence, but an attempt is made to supply its contents by other evidence.

It is claimed that the seventh clause of the mother's will is a virtual renewal of the memoria, tantamount to a new recognition of the mental incompetency of Maria Concepcion and an injunction for the fulfillment of the obligation thereby imposed. In the family all this was known and understood and respected.

José Maria died April 21, 1880. No proceedings were taken concerning his estate at that time. He left a will and by that will he gave his estate to a natural son, Anselmo. In October, 1895, an attorney filed a petition for its probate and it was admitted to probate in this court in that month without contest. On August 14, 1894, José Vicente, junior died, leaving a will admitted to probate in this court on the second day of October, 1894, the executors being Daniel Rogers, Thomas Magee and M. A. de Laveaga. The administration of his estate went on till, in the year 1895, an application was made to the court by Anselmo, the natural son of José Maria, for a legacy of $20,000 given him in the will. This application was made April 17, 1896. There was an appeal taken from this order upon the ground that the $20,000 was subjected to a reduction, it being limited with other bequests to a fund arising from certain property, and the supreme court so decided, and the balance was paid to Anselmo, after making this deduction. In the course of this application for the legacy, the question arose as to the legal status of Anselmo concerning the estate.

DEPARTURE OF MRS. CEBRIAN FOR EUROPE WITH MARIA AND THE REASON THEREFOR.

Before this time, in June, 1896, Mrs. Cebrian, formerly Maria Josefa de Laveaga, with her husband, left the state for Europe, taking Maria Concepcion along with them. It is asserted that the cause of her departure was that proceedings might be instituted to have Maria Concepcion declared legally

incompetent, or other proceedings might be taken which might disclose her mental condition and her incompetency to transact her business affairs. Whatever the reason, Maria was taken from the jurisdiction of this court in June, 1896, and did not return pending the trial of the Anselmo case. In 1904 a settlement was effected with Anselmo by which he released any claim, of any kind whatsoever, which he might have upon her death, against her estate. For seven years she was kept beyond this jurisdiction for the purpose of avoiding an appearance in court in the litigation coming out of the estate of José Vicente, junior. Commission was issued early in that litigation to take the depositions of Mr. and Mrs. Cebrian and also of Maria. The depositions of the former were given, but Maria was never subjected to an examination. For one reason or another the attempts to take her depositions were ineffectual.

Maria Josefa had intermarried with John C. Cebrian on December 23, 1875, about a year after the death of her father.

On one pretext or another the taking of Maria's deposition was evaded or avoided, a doctor's certificate served at one time and other expedients were availed of at other times; but at all events it was never taken. The Cebrians remained away during this period, except for a short time in the year 1901, leaving Maria in Europe. They were all absent during the trial in this court of the Anselmo contest, which was instituted on January 27, 1897, by the filing of a petition of that person claiming a share of the estate of José Vicente as the natural son of José Maria, asserting that he had been legally adopted and was entitled to inherit the same as the other nephews and nieces. A demurrer was filed to this petition and overruled on December 3, 1897. A commission for taking the depositions of the Cebrians and Maria was issued in February, 1898; the trial began October 5, 1898, concluded on February 11, 1899, and the trial judge rendered his decision upholding Anselmo's claim on June 4, 1900. The bill of exceptions was settled on April 30, 1903, the appeal perfected May 7, 1903, and decided by the supreme court February 9, 1904. By this final decision the question under

section 1387 of the Civil Code was not determined, for it was held that according to the evidence Anselmo had not been legally adopted under section 230 of the same code.

THE COMPROMISE WITH ANSELMO AND ITS PRINCIPAL PURPOSE.

On March 25, 1904, a settlement was effected with Anselmo for the sum of ten thousand dollars, and the amount was paid; the purpose of this compromise being mainly to avoid a revival of a contest in the event of the death of Maria Concepcion. It is the theory and the claim of contestant that the sole reason for making this settlement was to avert such a contingency, it being assumed by everybody interested, throughout the litigation, that Maria Concepcion was incompetent to make a will, that she could not make a testamentary disposition of her estate, and that it would necessarily be administered under the statute of successions and that the only manner in which a renewal of Anselmo's assault could be prevented was to secure a release by which he relinquished any possible interest he might have in it. This object was accomplished through negotiations by the other members of the family interested in the estate of José Vicente and also heirs at law upon the death of Maria Concepcion; she personally had no part in it. During all this time Maria was in Europe, whither she had gone or been taken on account of this litigation. After the decision on the demurrer, the Cebrians, anxious to return to California, declaring themselves exiled on account of the necessity of keeping Maria away from the state, said in a letter to Miguel, who was representing the interests of all concerned, that if this decision should be upheld by the supreme court Maria could never return; and this was one of the strong inducements to Miguel to consent to the settlement with Anselmo, to enable them to return from their exile in Europe, which they did within a month after this compromise was consummated, bringing with them Maria. It is claimed that the reason she was kept so long in Europe was their fear of proceedings to declare her incompetent, and that that apprehension was not dispelled until there was no longer prospect of Anselmo's assailing Maria's estate. Meanwhile, they were continually complaining of the legal situation which compelled them to involuntary absence in Europe.

THE SOLE MOTIVE FOR KEEPING MARIA AWAY FROM SAN FRANCISCO.

The sole motive of their absence was to keep Maria out of the reach of the courts so as to prevent the disclosure of her incompetency to make a valid will and thus provide against intestacy and a new action by Anselmo. During this litigation an effort was made by the opponents of Anselmo's pretensions to change the Civil Code, section 1387, to counteract the effect of the trial court's decision in his favor. All this was made known to the Cebrians in Europe, as they were advised of everything that was going on, and they knew and approved of the measure to amend the statute so that an illegitimate child could not inherit the same as a legitimate and this amendment was adopted in 1901, but on account of a technical defect in the title of the general act it was declared invalid, much to the distress, apparently, of all concerned in its passage, and the Cebrians inveighed bitterly in correspondence against the futility of the endeavor to better the law in their behalf so as to guard Maria's estate from prospective danger; in the succeeding session of the legislature, 1903, another attempt was made on the same lines, but the attorney for Anselmo opposed its passage and it failed of enactment. In all of this scheming and counterscheming to influence legislation and efface the effect of judicial decisions there is a curious study in the undercurrents of this litigation as disclosed by the evidence, which, perhaps, it is not practical to pursue, however interesting philosophically. It is asserted, however, that the whole design of these devices and intrigues was in furtherance of the common family understanding, and the recognized fact in the domestic circle that Maria Concepcion was not mentally qualified to make a valid testament and that some provision should be made against the contingency of her dying intestate, so legislative aid was invoked in vain to that end.

MARIA'S FIRST TRIP TO EUROPE IN CARE OF YGNACIA.

It was in April, 1884, that Maria first went to Europe, under the care of Ygnacia to whose personal control she

seemed to have been committed by the other executors, all of whom were very earnestly enjoined by their mother to protect her as long as she should live. This personal trust seems to have centered in Ygnacia on account of her own peculiar fitness and the circumstance that she was singularly situated to carry out its terms. Miguel had charge of the properties, Maria Josefa was married and had her own cares, José Vicente was otherwise occupied, and it necessarily devolved upon Ygnacia to execute the testamentary injunction of their mother and assume control of the younger sister.

MARIA REMAINS WITH YGNACIA UNTIL DEATH OF LATTER.

According to all accounts Ygnacia was the strongest character in this family; she seemed to have more individuality and mentality than even the male members; she administered the affairs of the house, even in the lifetime of her mother; and she received, as she deserved, the respect of all; and it was, therefore, natural that, in the circumstances, to her should be intrusted the care of Maria. After the mother's death, Maria and Ygnacia continued to reside in the house devised to them until the trip to Europe, whither they went together. The Cebrians were also abroad from 1884 to 1888, but they lived apart from Ygnacia and Maria. They were in Paris off and on from 1884 to 1887, but they did not live in the same house with Ygnacia and Maria, nor did they constitute a family circle; they were not at all domestically associated; they occupied separate apartments. Ygnacia headed her own household, taking with her to Europe as companions Juanita Laveaga and Celestina Halphen, and also, as servants, Crescencia Martinez and Diega Hernandez, and these remained with her and Maria Concepcion until her own decease in Rome in 1888. She went with Maria and the companions and servants to Rome from Paris about January 1, 1888, and a month subsequently she became seriously ill and died on the 18th of February, 1888. The circumstances of her illness and death are considered of importance in this case and some reference to them seems to be pertinent at this point.

ILLNESS AND DEATH OF YGNACIA—HER DEATH-BED MARRIAGE TO JOSÉ CERVERA.

During these latter days of her life the Cebrians were in Paris and were not aware of the condition of affairs in Rome until near the end when word was sent by one of the servants, whereupon Mr. Cebrian hastened to Rome, arriving a few hours before the death of Ygnacia. She had become engaged during the preceding year to one José Cervera and was married to him shortly before her death, practically upon her death-bed. When Cebrian arrived the husband, José Cervera, was there and also, a brother, Cesar Cervera. Maria had given no information to the Cebrians during this sickness for the reason, as is asserted, that she was unable to do so and the Cebrians were greatly perturbed and naturally distressed that Ygnacia had been there in the hands merely of servants during this critical period and that the man to whom she had been engaged, José Cervera, had contrived the marriage without any knowledge of or notice to her relatives. In explaining the fact that they arrived only at the last, the Cebrians wrote to his brother-in-law in San Francisco that they were not informed of the truth, stating that Maria, of course, was a child and unable to acquaint them with the facts, so it was left to a servant to communicate the intelligence of Ygnacia's condition to them.

THE CONSPIRACY OF THE CERVERAS TO ABDUCT MARIA AND MARRY HER TO CESAR CERVERA FOILED BY CEBRIAN.

One of the most remarkable features of this tragic episode as related by Mr. Cebrian in his correspondence was the conspiracy concocted by José Cervera and his brother to abduct Maria, upon the death of Ygnacia, take her to Spain and marry her to Cesar. Fortunately Mr. Cebrian came upon the ground just in time to foil the villains and in his communication recounting the incidents assumed the credit for having baffled the conspirators. His narrative of the circumstances and transactions connected with the last hours and the events subsequent to the decease of Ygnacia is most illuminative to show the nefarious character of the scheme by which, after having consummated the death-bed marriage of José to Ygna-

cia, it was purposed to abduct and marry off Maria to Cesar, who is described as a semi-epileptic. The marriage of Ygnacia with José Cervera he described as monstrous, taking place after she had received the last sacrament, when she could no longer raise herself in the bed, "the merry wedding bells sounded for her with the solemn toll of the dead." Ygnacia had been ill for some time and an operation had been performed, but, owing to her debilitated state and blood impoverishment, the doctors expected a fatal result and the end was anticipated from the beginning; but those who surrounded her took good care to conceal the facts from Cebrian and his wife, because their interest was to keep her isolated in her last moments and even the poor Maria was herself kept out of the chamber and scarcely saw or spoke to Ygnacia during the last fifteen days. She was entirely defenseless in the hands of these schemers. Cebrian's censure was cast not only upon the husband of Ygnacia and the brother Cesar, but also upon the servants in attendance for neglecting to send word as to the true situation, and for being concerned in the conspiracy. No blame was attached to Maria, as she seemed to have been considered incapable of comprehending and communicating the circumstances and appears to have been treated as a negligible quantity all around, except so far as her name could be employed in carrying out the purposes of others. After the failure of the efforts of the Cerveras to abduct Maria, she went with the Cebrians and, thereafter, was identified with their family; her expenses were paid from her own income, but she was considered as under their care and protection, Mrs. Cebrian succeeding to the position of Ygnacia.

CONDUCT OF CEBRIAN IN THE CRISIS—HE SAVES MARIA FROM THE CONSPIRATORS.

It should be said to the credit of Mr. Cebrian that in the crisis which confronted him on his arrival in Rome he acted with courage combined with prudence and circumspection and contrived by his self-control and will power to outwit and overcome the conspirators. He was alone against them all, aided

as they appeared to be by the servants and by the supineness of Maria, who was not mentally adequate to assert herself. She was passive and plastic in the hands of the conspirators and appeared acquiescent in their plans, willing to go with them and not return to Paris with Cebrian, until he by his finesse managed to rescue her from their toils. In his communication he gives a graphic account of the manner in which he achieved this result and of the pleasure it gave "poor little Maria," "the unfortunate," who wept and cast herself into his arms and did not want to leave him, after he had accomplished her salvation from the vampires who were seeking to entrap and abduct her. In these perplexing circumstances Mr. Cebrian acted with consummate adroitness and discretion and saved Maria from the fate prepared for her by the plot of the Cerveras.

MARIA CONSIDERED "A NINA," INNOCENT AND IRRESPONSIBLE, NEEDING PROTECTION.

He had the satisfaction in his own conscience, as he said, of having saved Maria, "a niña," innocent and irresponsible, from the worst of tortures, and of having complied with the duties of a man and brother, and of a son (in law), for he said they all knew that the intentions and wishes of the father and mother were that more than any other of their children, Maria should be protected.

The marriage of Ygnacia with José Cervera was not without doubt as to its legal validity, but this was not contested, and, as husband, he laid claim to her entire estate and this matter was adjusted by paying him the sum of $150,000, the amount being raised by members of the family, Mrs. Cebrian, José Vicente, Miguel, Maria being made a party to the agreement of settlement, which was approved by Mrs. Cebrian, Miguel and José Vicente guaranteeing the share to be paid by Maria, the representatives of José Cervera not being willing to accept her signature or her undertaking. This was a family transaction and they contributed in proportion to their shares in the estate of Ygnacia and thus they rid themselves of the Cerveras.

MARIA NOT CONSULTED IN IMPORTANT MATTERS—HER PARTICIPATION NOMINAL.

In all these matters, it is claimed by contestant, that Maria was not consulted at all, that she was a nonentity and that her participation in business was nominal and that the family answered for her. Even in the important transaction wherein Edward J. Le Breton was appointed receiver of the California Safe Deposit and Trust Company, where she signed as a surety on his bond it was all by arrangement with the family, she not being consulted at all by the parties in interest, Miguel guaranteeing on behalf of Maria, he not wishing, for the reasons of his personal relations with Le Breton to go on himself, to hold harmless Mrs. Cebrian for her share. Maria signed the bond and Miguel made the guaranty. This, it is said, was the usual course of business. Miguel handled the business affairs after the death of the father, the senior Don José Vicente. All of the affairs transacted in her name are sought to be explained in this way. Illustrations of this practice are, for instance: in October, 1905, a lease was made by Mrs. Cebrian, Maria and Miguel for a lot on the corner of Market street and Van Ness avenue, for a monthly rental of $1,000, for twenty years, the lessors negotiating to erect a building costing $75,000. The lease was signed by Miguel, Mrs. Cebrian and Maria, but the whole arrangement was made by Miguel, he simply consulting with Mrs. Cebrian, and Maria signed as a matter of course, without understanding the business or the transaction, and because it was assented to by Mrs. Cebrian and her brother Miguel; in July, 1906, that was after the fire, a piece of property belonging exclusively to Maria, on the corner of Market and Fell streets, was leased for twenty-five years at a monthly rental of $800, and a building was to be erected thereon costing $100,000. This lease was signed by Maria, but she was not in any way consulted; Miguel negotiated the lease without having had any consultation with Maria about it, he simply conferred with Mrs. Cebrian and with her consent Maria signed the lease. In August, 1906, a lease was made on a lot on Market street, one hundred and seventy-five feet west of Sixth street, for twenty years at a rental of $300 per month

and a $12,000 building to be erected thereon; this belonging entirely to Maria, and the transaction was made in the same manner as the others. In October, 1903, a daughter of Mrs. Cebrian, Mamie, was married in Spain. No message was sent any member of the family here by Maria, who was with Mrs. Cebrian, and no word of any kind came from her. In November, 1903, Miss Julia de Leveaga, daughter of Miguel, and niece of Maria Concepcion, was married in this city, but no communication of any sort came from Maria. The comment made upon the omission of this courtesy was that Maria was not expected to render it, and that she was not sufficiently intelligent to know that it was socially incumbent upon her, and that, moreover, she was unable to compose a letter.

ENDEAVORS OF FAMILY TO CONCEAL HER INCOMPETENCY IN THE ANSELMO LITIGATION.

During the litigation with Anselmo, when the question was mooted about her mental capacity, a form of letter was prepared here, sent to Mrs. Cebrian, and she had Maria copy it and sent it back to San Francisco, so that in the contingency it might be accepted as a letter from Maria, as against any claim of her incompetency, or inability to write a letter. It is asserted that Mrs. Cebrian participated in that act, and for that purpose, and as a part of the scheme in litigation to keep Maria from the jurisdiction of the court, and from being involved in any way which would expose her mental incompetency.

The contention of contestant is that she never arrived at an adult age in mind; she never mentally passed beyond childhood. At the age of fifteen her studies were like those of a child of seven or eight, never going beyond the rudimental degrees. She learned to write and she would talk upon simple subjects like a child, about the weather, about going to the theater or on the matter of dress, but in anything that required reason or thought she was elementally incapable, and so recognized and treated by all her family. She was alluded to by some of the acquaintances of the family as "tonta," "foolish," and "la tontita," "the little foolish one" (as the terms are translated), that is by the people not

in the immediate circle of the family, not by the members of the family. She did not comprehend the reason why she was taken to Europe, and knew nothing about the transaction of her ordinary business affairs. She was a proper subject to have been declared legally incompetent in a court of justice, and had it been necessary at any time for her protection that step would have been taken; but in order to avoid any such proceeding during the Anselmo litigation, she was taken abroad by the Cebrians, who were willing to banish themselves from the state for a long period of years rather than to submit to a judicial inquiry into her mental condition. It is finally asserted, most confidently, that the paper proffered for probate was not her act, but that it was prepared for her by some person who procured her to make a copy. As to the identity of this person no positive charge is made, but the circumstances point to the person, but the contestant at the outset exonerated Mrs. Cebrian from having any participation in the making of this instrument, inasmuch as she disclaimed having aught to do with it, and asserted that she endeavored to prevent it.

THE MAKING OF THE WILL—MRS. CEBRIAN'S STATEMENT AND DENIAL THAT SHE WAS CONNECTED WITH ITS EXECUTION.

Mrs. Cebrian denied having anything to do with the making of this instrument. She testified that she first saw the paper the day that Maria signed it and gave it to her, the day of its date, February 15, 1893, in San Francisco, in her room, 1801 Octavia street, in the Cebrian house, Mr. Cebrian and herself being present, none others; Maria had called Cebrian and herself to her room, after luncheon; it was all written when they went into the room; she gave it to Cebrian to read it for them; then Maria gave it to her and Mrs. Cebrian wrapped it in a handkerchief and put it in her drawer. Maria folded it herself and it remained in that handkerchief. For some time it was in the drawer until when she left San Francisco to travel she took it with all the papers she had in that drawer and put them in a trunk and there it was preserved all those years until June, 1909.

CUSTODY OF THE WILL—SIXTEEN YEARS IN AN UNOPENED TRUNK —DESTRUCTION OF THE CONTENTS OF THE TRUNK.

The trunk was kept in the house in Octavia street, there were many other things in that trunk, among them letters and papers of no use to her which she destroyed when she unpacked the trunk looking for her sister's will. There were pictures and an album in the trunk which she kept. This trunk was packed by Mrs. Cebrian in 1893, before she went to the Chicago exposition and remained unpacked until June, 1909, never opened during that time, locked. She retained the key. In this trunk when opened after her return there were found many articles of apparel. letters from old friends and an album; the letters were destroyed, the album preserved; the only paper that was left that had been in the trunk was the will enveloped in the handkerchief. Mrs. Cebrian said that she did not remember anything of the will when Maria died, because she was so overcome with grief. The first time it occurred to her was when she answered her brother's letter by cablegram, when she remembered that he was named as administrator; she had not seen this will since 1893, and she did not remember what disposition Maria made of her estate until she opened and read the will; she knew that to a great extent she was a beneficiary; she had not spoken to anybody about the will from the time she put it in the trunk, except with Maria after the fire of 1906; she had not told Maria not to make a will at any time; the paper was not signed when Maria handed it to her; she signed it in her presence; none of her children knew of the existence of the will; the only person in Europe that knew was her husband; she never spoke to Miguel about the will. When she was in Paris in March, 1909, she remembered that the will was in a trunk in her house, but which particular trunk she could not recall, she had so many in the basement of her house; she did not remember about the pictures and the album, but she did remember that the will was locked up in a trunk there; it was the only trunk in which she kept valuable papers. She did not have a safe deposit box, but her husband had, some of her valuable papers were there, some in her trunk, or her drawer, or wherever it pleased her. The

first time Mrs. Cebrian knew that Maria had made a will was as narrated; she did not tell Maria then and there not to make it; it was made already, nor did she ask her not to sign it; but her brother José Vicente, had said very often to her, "You ought to make a will"; she could not produce the handkerchief in which the will was wrapped; she had not used the trunk in her travels, nor had she opened it for sixteen years; the pictures that were in the album were tokens of affection from friends. In the room where Maria was when she wrote the will there was no law book; Maria said to her, "You come here, Pepita and Cebrian, and see," sitting down at her writing desk and continuing, "See, I have signed, here is my testament and will"; they remained a few minutes, when Mrs. Cebrian went into her own room adjoining and left Cebrian with Maria; after a while Maria and Cebrian followed into this apartment and it was then and there that Maria handed the paper to her and told her to keep it; while Maria was there with them Mrs. Cebrian took the paper, wrapped in a handkerchief, and put it in the drawer, locking it up; after about five months she removed it to the trunk as stated. Mrs. Cebrian had no idea why she and her husband had been called in by Maria. No lawyer had visited the house to see Maria nor had Mrs. Cebrian known of her consulting any attorney before that time; she did not expect when Maria called her into the room that it was in connection with signing a paper; she had not importuned Vicente not to have Maria make a will; when Vicente spoke to Maria about making a will he thought it was necessary, it was good to do so, the father and mother had made wills and he advised a similar course to Maria and her sister. Mrs. Cebrian said that she did not importune Maria to make a will, she did not tell her not to make it.

MRS. CEBRIAN'S LETTER TO MIGUEL CONCERNING THE FINDING OF THE WILL.

Mrs. Cebrian recognized a letter dated Tuesday, May 25, and Wednesday, May 26, 1909, written by her to Miguel, in which she expressed herself as follows:

"Dear Miguel:

"I feel very badly that you did not care to speak to me when I arrived at my house anxious to see you and to weep with you and to console ourselves together after the death of my dear Maria and to give you this will and to explain to you how it came to be made.

"Vicente was the one who importuned her many times to make it and finally she gave in (cedio) and when she told me about it I told her not to make it, but she made it. She gave it to me to keep and I did not remember that that document existed and I did not see it again until today. Since my poor little (thing) died Cebrian and I have never spoken of the will nor the estate until we received in Paris your letter full of fear and anxiety on account of the estate which was entirely new to us and owing to my long sickness which I did not think sufficiently and with great tenderness (love) for you and with the best of desires to eliminate your anxieties I telegraphed you. Too bad that I was mistaken in doing it for never would I have believed that you could have condemned me on account of appearances and I was very tranquil because I could not believe it until I saw that you would not answer to my telephone. What a horrible shock. What a terrible shame that you have insulted me by writing and before your children without any motive. But I forgive you and in the name of our sainted Mother hope that you will think and will reconsider and that we will be able to talk it over.

"Finally on Sunday I found the will and I send you a copy of it and I do not know yet whether you desire to present it jointly with me which is our duty. If you do not care to do it I will have to present it personally together with my petition of which I also send you a copy.

"Reflect it well Miguel and if we do not present it jointly you fill in the lines in paragraph 12 of the petition that which in your conscience you believe just before I will sign it.

"It is clear that if we present it together there is not the slightest necessity that the Court should know anything about it, if it is agreeable to you to arrange it between ourselves privately, which we can do by writing before a notary. All this

I would have told you with more explanations on the 17th if you had consented in seeing us and talking the matter over, not as strangers, but as brother and sister, all would have been arranged to your satisfaction in an instant.

"Wednesday.

"Yesterday I could not finish this on account of a strong pain in my head and in place of Tuesday I put Monday on the letter. This is all I can tell you by letter. I confide in God that you will consider the matter well.

"As ever, your sister,

"PEPA."

MRS. CEBRIAN'S EXPLANATION OF THIS LETTER AND HER PROPOSED PETITION TO THE COURT PREPARED BY HER HUSBAND, WITHOUT LEGAL ADVICE.

Mrs. Cebrian explained that she meant by the expression in this letter that she never would have believed that he would have condemned her on account of appearances, that Miguel got "mad" because Maria had made a will and she had not told him about it; that is what he had said, that he was very angry that she had concealed the secret of Maria's will for sixteen years, and that she had copied that will without telling him; when he was very angry he claimed that she was incompetent.

Enclosed with this letter from Mrs. Cebrian to Miguel was the copy of the proposed petition, which she said was prepared by her husband, and which reads:

"Maria Josefa C——, wife of J. C. ——, a resident of S. F., and for over twenty years at 1801 Octavia St., deposes and says:

"(1) Maria C. de L——, her younger sister, a feme sole, a resident of S. F., and also for over twenty years at the above said address, died, while traveling in Europe, at the city of Madrid, Spain, on the 4th day of Feb., 1909, a victim of pneumonia;

"(2) That said decedent was then traveling with deponent and her family;

"(3) That said decedent lived uninterruptedly with deponent, at their parents' home, or at school ever since her

birth until deponent's marriage in Dec. ——, 1876; and thereafter again, said decedent lived continuously since Feb., 1888, until her death, with deponent and her family, but at decedent's own expense;

"(4) That between Dec., 1876, and Feb., 1888, said decedent and deponent had their meals together, an average of 25 days every month, whether at said decedent's residence, or at the deponent's residence; and also in that interval of time they on several occasions lived under the same roof for weeks at a time;

"(5) That in the month of Feb., 1893, said decedent called deponent to her room, signed in her presence a paper and handed it to said deponent saying: 'Here is my will and testament; please keep it for me, or rather for yourself'; and deponent kept it in one of the closets at her above said residence; in Octavia St.;

"(6) That before and after said decedent's death deponent kept a correspondence, by mail and telegraph, with her brother, Miguel A. de L——, of S. F., and of Bien Venida, Contra Costa Co., Cal., until the 27th of April, 1909, when deponent wired him her safe arrival in New York City;

"(7) That deponent was taken ill in Madrid, after her sister's death, and again in Paris, and could not return to S. F. until the evening of the 12th day of May, 1909;

"(8) That since the 14th day of May, knowing her brother Miguel has an interest in last will and is also named therein as executor, deponent has tried to meet him and talk to him, even by telephone, but without success;

"(9) That since her arrival in S. F. deponent has not been in good health, but has been looking for said will in her above said residence, and found it on the 23d May, and now deponent files said last will and testament in this court, declaring it is the same will handed to her by said decedent in Feb., 1893; and that deponent is the person mentioned in said will by her pet name 'Pepa';

"(10) That deponent declares she never mentioned the matter of a will to said decedent, nor ever insinuated to her the making of a will; that it was very unexpectedly that she received from said decedent the said will in Feb., 1893; that

deponent never mentioned the existence of said will to any of her children, until the said 27th day of Apr., 1909, when she met her third child in New York;

"(11) That considering that said decedent spent over 38 years of her 50 years of life in the company of deponent, or deponent's family, in perfect communion of spirit, without ever the shadow of any disagreement, deponent thinks it perfectly natural and thoroughly just that if said decedent should write her last will, it would be favoring in some way deponent's family, as decedent had publicly and repeatedly declared in the presence of many friends;

"(12) That notwithstanding the justness of the foregoing, deponent submits to this Hon. Court her wish to alter the last provision of this will, provided the law permits, in the following manner, to wit:

"To suppress the paragraph 'Dejo todo lo que me quede a mi hermana Pepa o a sus hijos, si ella no me sobrevive' (lines 12 and 13 of will) and to substitute instead the following words:

"I bequeath .....
....
....

"(13) That deponent hereby prays this Hon. Court to issue letters of administration for the estate of said decedent to her, jointly with said M. A. de L——.

"And your deponent will ever pray, etc., etc., etc."

THE CONSEQUENT CORRESPONDENCE.

Mrs. Cebrian testified that this paper was prepared without the advice of a lawyer; she did not intend to present that paper to the court; she wanted to bring her brother to reason by all the means she could; a message of love, not intended for the court. The statement in the fifth paragraph of this paper that she kept the will in one of the closets at her residence in Octavia street was not correct, the rest was true, "more or less"; her husband wrote the paper for her; she never mentioned the matter of a will to Maria, nor ever insinuated to her the making of a will and she had not anticipated the action of Maria. It was true, as stated

in that paper, that Maria had repeatedly and publicly declared in the presence of friends that her intention was to leave everything to Mrs. Cebrian and her children; she said it to several, after Ignacia's death, before she made this will, in Paris she said it to Mr. Cazet, she said it to Mr. and Mrs. Guerrero, in San Francisco, so many persons were present she could not remember.

To the letter containing this proposed petition Miguel replied as follows:

"Dear Pepa:

"Being in the City to-day, I was handed your letter of Tuesday with a copy of a curious document which pretends to be Maria's testament. I hasten to answer to show you there is not the least hesitation in the course I propose to follow in this matter. You know as well as I, that Maria was incompetent to make a will. As you know, our father left a memoria naming Nacha and myself guardians of Maria because she was incompetent. I obeyed that request religiously. I gave Maria my services for over 30 years free of charge, increasing her fortune considerably. I believe that in justice and in law I am entitled to one-half of her fortune, and on this point I am confirmed and positive. I do not think it will be difficult for me to show that Maria was not competent to make a will. That monstrosity speaks for itself. I believe I can easily prove it without going very far, with your own letters written before and after the date of said paper. My private correspondence was not burned and I believe your affidavit will suffer when it is compared with the contents of your letters. I am ready to make an arrangement, as I said before, half and half to each one. In case this does not meet your approval, you may file that paper in court, and I will take steps to protect my rights. As for the legacies, it is unnecessary to say I would respect these, because it is a good deed. Yours,

"MIGUEL."

In answer Mrs. Cebrian wrote:

"Wednesday, Bien Venida.

"I received your letter, and see that you think that paper has no value. According to your opinion, I am mistaken,

and one who is mistaken had better say nothing more. Therefore, send back to me the papers which I sent you today with my letter, because they are mine, and I want them, and they have no value for you or anybody else. Send them back to me. I suppose that the court will give us the property, as you desire, half and half. There is no necessity to write insulting letters, or letters insulting the memory of the dead.

"As ever, your sister,

"PEPA."

"That paper having no value for you, there is no necessity to present it, and in this way the court will distribute the property according to law, and in this way the matter will be most simple."

In reply Miguel wrote:

"Bien Venida, Cal., May 28, 1909.

"Dear Pepa:

"I received last night after 8 o'clock your letter of Wednesday. I see your acquiescence that the property of Maria be distributed by the court according to law. Now, the question is, how to present ourselves to the court. You have informed me that a document is in existence which purports to be the will of Maria, but which I do not recognize as such. If I ask for general letters of administration (what I have now, or special letters) I have to swear that I do not know of any will; no matter that in my judgment it has no value. We must be very circumspect on account of Anselmo, who, I have not the slightest doubt, will try to cause difficulties. (According to Vin., this also the opinion of his uncle) he will try to see that what he can get out of us under the pretext of new evidence, and who knows what other allegations.

"Yours,

"MIGUEL."

Then ensued the following correspondence:

"San Francisco, May 31st, 1909.

"Dear Miguel:

"Your letter of the 28th came to me on Saturday, the 29th, night. I understand that you do not want to present to the Court a document which you do not recognize. I do

know that that document is the truth pure. I am ready to present it, but if you think to dispute it I will not present it, because I never wanted lawsuits, nor fights, nor lawsuits 'with any of my brothers (not even for injury inflicted by them)' and it will not be I who will give you leeway to insult before the Court the memory of our parents and sisters as you threaten to do.

"Now if you have reconsidered and you promise me by writing not to dispute that document, I will present it any day asking for general letters of administration for you and me.

"I have not as yet a lawyer. Until now my lawyer has been God, who sees my conscience.

"Your sister,

"PEPA."

"M. A. de Laveaga, R. F. D., No. 1,

"Berkeley, Cal.

"Bien Venida, California, June 1st, 1909.

"Dear Pepa:

"Received tonight your letter of May 31st, frankly I do not understand it. As I already wrote to you in my letter dated May 25 (it ought to have been May 26th) my position is simply this: I consider that before God, Justice and the Law I am entitled to one-half of what Maria left in fortune, this I will defend before the court or courts with all means in my reach.

"In your letter of Wednesday last you consent that the property be divided half by half between us two. If we arrange this satisfactorily between us two I don't see any necessity why I should promise in writing not to dispute that paper. Yours,

"MIGUEL."

"Wednesday, June 2, 1909.

"Dear Miguel:

"You tell me you don't understand my letter, and I see you have also not understood my former one. Read them with calmness. I have not consented that the property shall be divided half and half. I have said that the Court should divide it according to the law of the State, be that what it

may. Remember how I have acted all my life, and think how you have treated me lately. Read again my last letter. I now confirm it. Your sister,

"PEPA."

"Bien Venida, Cal., June 2nd, 1909.

"Dear Pepa:

"Your letter of today received. All I can say is that you know my position and my determination. Now, do whatever you want. Yours,

"MIGUEL."

"Dear Miguel:

"Today I have consulted with a person very respected in California (who is not a lawyer) and with great sorrow of my heart he has convinced me that the law obliges me to present the will. I am sorry, for I did not want to present it if you have to attack it then I was ready to let the law follow its course without the will.

"As soon as the papers are ready, my lawyer will advise you. Your conscience will dictate you what you do. No matter what the results are my parents and my brothers and sisters will know the same as God that I never attacked them. They will know that the step I take is against my will, compelled by law. No matter what the end will be I will never cease to wish you the best.

"As ever, your sister,

"PEPA."

"Don't forget to send me the papers that I asked you for in my other letter."

"Bien Venida, Cal., June 3, 1909.

"Dear Pepa:

"I acknowledge receipt of your letter of today. You say 'I was ready to let the law follow its course without will.' In your letter of Wednesday, May 27th, you say 'that paper not having any value for you, it is not necessary to present it, and in this way the Court will distribute all the property in accordance with law, and in this way it would be more simple.' To this last I answered to you in substance the same which that person so highly respected in California tells you, telling you that a will, or an alleged will having been men-

tioned general letters of administration could not be asked for without mentioning the will. You being ready to concede me one-half of the property, what I ask and insist upon, we can make between us two satisfactory arrangements on this point. There will be no necessity for me to dispute that paper when it is presented into Court. Yours,

"MIGUEL."

"Read your letter of Monday Tuesday, you make me a similar proposition."

"Bien Venida, June 10th, 1909.

"Dear Pepa:

"I see there is going to be war between us two. Of this I was convinced from the moment I received the dispatch which said there was a will (made behind my back and guarded as a great secret) and prepared myself for it, but that it may not be said that the blame is on me, but only to protect my rights (Duty I owe my children) I want to call your attention to the following:

"In your letter June 2, 1909, you say: 'Remember how I have behaved towards you'? To this I answer, what has been done speaks for itself; now how have I behaved towards my sisters: I have been executor of my father, mother, Nacha and of Vicente. I have managed all where we had mutual interest, never have I charged a cent, yet I have spent out of my pocket for the mutual interest.

"In the Estate of Vicente, you went to Europe and left me alone to fight the suit of Anselmo. I worked hard, and had a compliment from MeE and even D. in open court said Mr. de Laveaga makes a big fight. I received my share of the commission in the estate, and what did I do; notwithstanding of having done all the work, I divided it up to the last cent, giving you and Maria, to each one-third. This has been my conduct to you all since the death of our father. This in itself seems to me would be sufficient to break the will of a person more rational than our poor Maria. For thirty years of faithful service what does she leave me of an immense fortune that which a cheap miserable clerk—without any responsibility would have earned; without entering into

calculation I think it reaches to one hundred dollars per month; calculating interest on interest at 5% for thirty years.

"Besides this it seems you forget that after the death of Nacha there was a great deal of correspondence about Maria in relation to Doña Celestina Juanita and Cervera. Without doubt, Cebrian will recollect what he wrote about this last regarding Maria he (Cebrian) thought I did not understand his insinuations and afterwards used the most vulgar word. Of this on my word of honor not one of my children knows and will not know it unless it is forced in protecting my rights.

"Besides there have been enough letters in regard to Maria during the many years that you were in Europe and during the suit of Anselmo when Dwyer threatened to have Maria put under the guardianship of the Court.

"I swear to you, as disagreeable as it may be to me, that I will use all the legal means in my reach to guard my rights and as I tell you I let you know beforehand that later you cannot complain.

"Up to now I have not consulted any lawyer, besides Vin, as soon as Mr. Lyons puts on file the pretended will I will see one of the first lawyers of the city and will present him my whole case and you will have my answer in court.

"Now, good bye.

"MIGUEL."

"San Francisco, Friday, June 11, 1909.

"Dear Miguel:

"I can answer each point of your letter with advantage to myself but it would be very long I not being at your side to explain to you some words that you would not understand. That is why I desired to talk with you. You refused me and forced me to present the will. Now, I am in the hands of the law and God's will be done. Your sister,

"PEPA."

THE CONNECTION OF CEBRIAN WITH THE TESTAMENTARY TRANSACTION.

As to the connection of Mr. Cebrian with this transaction it is claimed that he was the mainspring and he was the only

person who could have managed the matter; he was the man through whose machinations the plot was contrived and executed; the complaint of contest does not mention him, but recites that decedent was influenced by parties unknown, for at that time the contestant could not know the circumstances of the fabrication of the instrument, which is asserted to have been copied from a form prepared for Maria. It was not until the examination of Mrs. and Mr. Cebrian developed the incidents that inferences could be drawn irresistibly implicating Cebrian as the author of the document and the procurer of the paper propounded as her will. Mr. Cebrian denied that he had anything to do with the paper or ever saw it anterior to the occasion when Maria called him and his wife into her room; he knew naught of its contents prior to that time; after she signed it he read the whole of it; Mrs. Cebrian left the room before he finished reading it aloud, and he subsequently communicated to her its contents on the same day; after Mrs. Cebrian left the room he and Maria had a conversation for perhaps twenty-five minutes and then he went into his wife's room with Maria and the latter handed the paper to Mrs. Cebrian; he had no knowledge of the making of that paper before he was called in by Maria and from the time Maria left the room until May, 1909, he never saw the paper again. During that entire period he never spoke to anyone except his wife about the will. He had seen Maria before she made the will on the same day. He had spoken to her about a will some months before that time in his own house; but he had never procured a form of any will for her nor did he know of any form having been furnished her, nor of any law book containing forms being given to her, nor of any translation of any will being shown to her; so far as this paper was concerned it was a surprise to him when he was called in by her; when Maria spoke to him five or six months before this time she said, "Vicente thinks we ought to make our wills, Pepa and I," and she remarked that it would be a good thing for all of them to make their wills and she asked him if he had made his will; she did not tell him of her intention to make a will, but she did state what she proposed to put in her will, that everything she had was for

"Pepa," that is his wife; she said this several times; sometimes there were present the children, sometimes Pepa, and at other times he alone with Maria; one time Clemente de Laveaga was present, the father of the children who were left $15,000 in the will; Cebrian knew that Vicente had talked to Maria about making a will, not this particular paper, not "importuned," but he had said several times that it was expedient for everybody to leave a will. The letter of May 25 and 26, 1909, was written by his wife, he saw it after it was written and read it and prepared the paper that was attached to it, the form of petition, he and his wife prepared it together and he made the copy of the will annexed to it, and he knew that the matters stated in that letter were correct. Mr. Cebrian knew approximately the value and the character of her property.

CEBRIAN'S ACCOUNT OF WHAT OCCURRED AT THE TIME—HIS CONVERSATION WITH MARIA.

Mr. Cebrian testified that after Mrs. Cebrian went out of the room, on the occasion of his reading the will made by Maria, he remained and talked with the latter and she said to him, "Well, Vicente has explained, as you know, very often about making the will. I told him I don't like to make the will because I don't want to make it public. I don't want to have the notary know it, as in the case of Ignacia, I don't want to have friends as witness as in the case of my mother," and then Vicente told her that there was no need of any notary or any witnesses: "You may just write your will on a piece of paper, and that is all, only be careful that the piece of paper has no initials, no printed matter, and you write it all by your own hand; there is no need to call in a witness"; and she said to Cebrian, "Well, as soon as I saw that it was so easy I made it"; Cebrian then said to her, "Well, how is it that you don't leave anything to Vicente?" and she replied, "Well, Vicente told me that he had already made his will, and he left nothing to her, nor to Pepa, nor to Miguel; that he knew that all of them were rich enough to get along and he left all to charity, so if she in making her will left him nothing he would not complain"; that was why she did

not mention him in her will; then Cebrian said to her, "Well, Maria, I thank you, I know that you love my children, but I see that this will will bring them trouble"; she asked why, and he answered, "because you leave so little to Miguel," and she replied, "Never mind about that; that is my wish, and if I had twice or ten times what I have, I would not leave him any more; he is just as rich or richer than I am; his children will inherit all his riches; his children have a rich uncle besides, and then, as you know, everything I have in this world is for Pepa. Pepa is the person I love most in this world, and such is my will." In this conversation she said that when she found out how easy it was to make a will in writing she sat down and wrote this will; that was her statement to him; so he understood that she was just learning from her brother Vicente that she could make a will in her own handwriting, she just sat down and made this will of her own motion and without any help from anybody. Maria also said to Cebrian, "At the beginning I was going to leave less to Miguel, but afterward I thought to leave him that much," he remembered this remark perfectly, although he forgot it for the moment in his first statement of a conversation that lasted twenty minutes or more on that occasion. So far as he knew Maria made this will without the aid of any one.

CEBRIAN'S KNOWLEDGE OF LEGAL FORMS.

Mr. Cebrian had with him in Europe during the eight years of the Anselmo litigation a copy of the Civil Code of California presented to him by Mr. Jarboe, the lawyer, many years prior in 1884; he did not have it in 1896–1904 in Europe, but he did have it from 1884 to 1896; in preparing the form of petition attached to Mrs. Cebrian's letter to Miguel of May 25–26, 1909, he did not consult any form; composed it entirely without recourse to any form book; he had known prior to the date of the will of Maria, February 15, 1893, that the intrusion of printed matter in a will otherwise holographic would invalidate the instrument. In reference to the letter of May 25–26, 1909, Mr. Cebrian said that although he drafted the petition inclosed with it, Mrs. Cebrian wrote the letter of her own volition. He said: "I did

not dictate to her; I am not a tyrant"; but it does appear that the petition, in conformity with the contents of the letter, was his handiwork.

As to what occurred in and about the making of this will we have no testimony except out of the mouths of Mr. and Mrs. Cebrian in their oral evidence and what is stated in the correspondence and form of petition hereinabove reproduced. Nobody but these two testify as to how this instrument came into existence; and in all their communications with Miguel, prior to their arrival in San Francisco, neither disclosed to him nor to anyone else the contents of that document. From February, 1893, to May, 1909, although the paper was in their possession, no word was uttered to him of its existence. Their correspondence was continuous and copious, but not a suggestion in it all that Maria had executed this instrument until after Maria's death, when she cabled to Miguel, March 23, 1909, that there was a will in which he was appointed administrator. Mrs. Cebrian said that the first time she thought of this will after Maria's death was when she received in Paris a letter from Miguel to which she answered by cable as follows:

"Paris, March 23, 1909," addressed "Laveaga, 1228 Geary, San Francisco." "Maria's testament appointing you as administrator is kept at my home. Pepa." The next day she received the following from him: "March 24. Cebrian, care Hottinger Co. Paris, France. Cable explicit directions exact location Maria's Will. Important, Miguel," to which she answered: "Paris, March 25, 1909, Laveaga, 1228 Geary, San Francisco. Can't remember. Will soon be there. Pepa."

Neither she nor Cebrian made a direct statement about this paper in all these years and the question is asked, why did they go along in this covert manner and then finally submit in the form of a petition to Miguel the proposition as to how much of the estate he chaimed? Before the examination of Mrs. Cebrian was concluded she left the stand and on account of illness she did not reappear and when her husband was asked if he aided in the letter she wrote accompanying the proposed petition he said he did not, he made no sug-

gestion, adding, "I am not a tyrant." He admitted that he had written the petition, at the suggestion of his wife, but the letter itself was of her own volition; he did not dictate to her.

MRS. CEBRIAN'S RELUCTANCE TO PROPOUND THE WILL.

Near the close of the correspondence consequent upon the proposal to settle on a half and half basis the negotiations were terminated, after she had consulted with a person very respected in California, although not a lawyer, and to the great sorrow of her heart he had convinced her that the law obliged her to present the will. She was sorry for this, as she did not want to present it, but as she had been advised as to her duty, and her obligation to the law and to conscience she would present the instrument to court against her own wish and will.

MRS. CEBRIAN'S WILLINGNESS TO DIVIDE THE ESTATE EQUALLY WITH MIGUEL.

Up to this time Mrs. Cebrian had consulted no lawyer; she was apparently dealing directly in a fraternal spirit, imbued by sisterly affection, with her only brother, whom she dearly loved, and with whom she was extremely anxious to avoid misunderstanding or conflict, doubtless mindful of the solemn testamentary adjuration of her mother to avoid lawsuits and all manner of judicial proceedings as prejudicial to the tranquillity of families and ruinous of their interests and not to seek advantage one over the other in the divisions of their patrimonies; so, notwithstanding the will, she broached the proposition to Miguel to make an equal partition of the properties; she preferred not to present the paper for probate if her brother should undertake to dispute it, and let the court divide the property half and half, as he desired; in this way, she wrote, there would be no necessity to present the will, and the court would make distribution, "according to law," which would be most simple.

HER CHANGE OF POSITION.

Of course, if this plan were agreed upon the will would be suppressed and the estate would devolve upon the two

equally by the statutes of succession. To this plan an impediment was interposed that allusion to a will could not be avoided as general letters of administration could not be obtained without inquiry into the fact of the existence of such an instrument. In this Miguel told his sister the same in substance as the highly respected adviser whom she had consulted on the subject. It is insinuated that the intervention of this adviser was brought about by the subtlety of Cebrian, who designed to divert his wife from her desire to amicably adjust their differences without recourse to law. When she returned to California she intended to settle the matter without litigation and equalize the division of the property with her brother, thus complying with the charge, desire and ordination of their mother that the children should abstain from any attempt to seek advantage over each other, and above all things keep out of the courts and compose their controversies or "unadjustable differences" by submission to arbitrators or friendly adjusters who should name a person of probity, love and reliability to decide between them.

MRS. CEBRIAN IS ADVISED TO PRESENT THE WILL.

There is no doubt that when Mrs. Cebrian came back to California her disposition was to respect religiously this request so piously inculcated by the terms of the testaments of the parents from whom they all derived their fortune. In her letter of May 25–26, 1909, she pleaded in the name of their sainted mother that they should come together and consult as brother and sister, so that all would have been arranged to his satisfaction in an instant. At that time she was ready to settle without advice or interference from the outside, but, afterward, through some influence, she was induced to consult with an adviser who convinced her that it was her duty to present the will to court. This adviser was the Reverend Antonio M. Santandreu, whose advice was sought as a business matter, a friend of the family, their spiritual director and pastor of the church which the family attended; and here is where the truce ended and the fight began.

Father Antonio was apparently reluctant to testify as to this advice until he was instructed by the court that he was not under the statute privileged to refuse, when he repeated the conversation he had with Mrs. Cebrian about the will, he had her permission to tell it, otherwise he would decline; it was not under the seal of the confessional, but he considered it the same as if he were a lawyer, a confidential and privileged communication, but being released of any obligation of confidence by her, he stated that she told him that she had nothing to do with making the testament, but that Miguel was going to contest unless he got half; Father Antonio advised her against conceding a compromise, as considering her children she had no right in conscience to surrender their interests; that if she were alone in the world she might do so, but not otherwise; and she accepted and acted upon this advice, which was to go ahead and assert the rights of her children and fight to the end and get what she could for them.

FATHER ANTONIO SANTANDREU'S ADVICE ACCEPTED AND ACTED UPON.

As Father Antonio enters so importantly into this contest as the adviser upon whom proponent relied for her change of base and assumption of an attitude of resistance towards her brother, it may be well here to consider briefly his testimony concerning his relations with and knowledge of this family:

Father Antonio M. Santandreu was the pastor of the Church of Nuestra Señora de Guadalupe, the Spanish Church; he was educated for the priesthood in All Hallows College, Dublin, and spent three years there as a seminarian; he was a native of Barcelona, Spain, and was sent to Ireland to learn English; in order to come to California, whither he came in 1876, having been ordained in Ireland in the month of June of that year, and in a few days thereafter he started for America, and reaching San Francisco he was assigned to St. Patrick's Church; afterward to Guadalupe, as assistant pastor, where he served till the month of May, 1877; thence to Mission San José until 1879; after to Calaveras county, where he was pastor until May, 1880; then he was appointed

to Half Moon Bay, San Mateo county, where he continued to labor until November, 1886, at which time he resigned that pastorate and went to Europe on a vacation of six months. Returning in 1887 he went to Guadalupe again as assistant, and in 1889 became pastor and has been there ever since in that capacity; his native tongue was Spanish, although he spoke also English, Italian, Portuguese and to some extent German and French; he knew decedent for many years; he became acquainted with her in the house of Mr. and Mrs. Cebrian when he became pastor of the church, in 1889, at which time he also became acquainted with Mr. and Mrs. Cebrian and the members of their family; they had front pews in his church. Maria frequently visited the church, as a rule on all great occasions and festivals. He did not remember the first time he met here there; he saw her once alone and at other times, always with some member of the Cebrian family; she was coming as a regular Catholic to the church to pray; he was generally perhaps twenty-five feet away from her while observing her; he saw her at a special devotion, Portiuncula, which begins at 2 o'clock on August 1st and ends at 7 in the evening of August 2d; she was alone at that time; he did not remember the year. Father Antonio knew the family only by reputation prior to 1889; he knew that they made a trip to Europe in 1896; he visited Maria the day before in Octavia street, in the house of the Cebrian family, to bid them good-by; he talked with all the family, Maria included, at that time; he could not state approximately how often he called upon them during the seven years from 1889 to 1896; Maria made many donations to the church; when he visited the family he never saw her alone, there were always others present. When she returned from Europe he met her and had conversations with her about her travels; she liked Europe better and he tried to argue her out of that notion, insisting that this country was preferable, but she persisted in her views; she greeted him in a very nice, agreeable manner; she talked generally about churches and the general attendance there and the like; he did not visit her directly, but visited the whole family; pastoral visits.

FATHER ANTONIO'S ACQUAINTANCE WITH THE FAMILY—HIS OPINION OF MARIA'S COMPETENCY.

Father Antonio knew the daughter of Mrs. Cebrian who was married over in Spain; he had a conversation with Maria about the marriage after her return; she spoke of it as a grand ceremony, the greatest event they had during their sojourn in Europe; all the people of the town turned out to celebrate. This conversation was in 1903. He would go to the Cebrian house possibly about once a month, and then possibly not for two months or three months, and then sometimes more than once a month, according to what he thought his duty. The Spanish Church was almost totally destroyed at the time of the earthquake and fire, but a temporary structure was built over what remained of the foundation. Maria visited the church subsequently to that time, but he remembered only the occasion referred to of the Portiuncula, when she was making a time of special devotion, when she was making visits and went to confession there; he believed she came to him.

After the fire he continued to call from time to time at the home of the Cebrians, until they made another trip to Europe in 1908; he was there the day before their departure for about half an hour and had conversation about the trip, wished them a good voyage and a safe return, the sooner the better; he saw them on the day they started, went across the bay with them to the train; Maria said she was most delighted in making the trip; as they went away they said good-by, which is their "adios" in Spanish, which was the language in which they always conversed; always spoke in Spanish.

Maria was godmother to some of the children of Mrs. Cebrian; Father Antonio was the officiating priest at the baptismal services three or four times; the usual formula of the baptismal ceremony was complied with; Maria made appropriate responses, reciting the Lord's Prayer, the Apostles' Creed, audibly, after the manner prescribed by the priest; her conduct and demeanor on these occasions were rational; she gave him on one occasion forty dollars, two twenty-dollar pieces, she always gave him something; she stood for at least three children; the names of the children are preserved on

the baptismal registers. Maria received Holy Communion at his church more than once; she made confession to him at the church; but he was not her regular confessor.

Father Antonio procured a transcript made by himself from the records of his church, which certified as to the baptisms at which Maria was godmother, reading as follows: "Edward Francis Antonio Simon was born of the above parents, September 26, 1882, and was baptized October 28, 1882, by Rev. A. Garriga, and were sponsors Eusebio Molera and Maria de Leveaga"; then also the item: "José Vincente Alejandro Ricardo was born of the above parents December 16, 1890, and was baptized by Rev. A. M. Santandreu, February 5, 1891, and were sponsors Vincente de Laveaga and Maria de Laveaga"; and then the item: "Julio Rafael Ignacio Angelo was born of the above parents July 16, 1889, and was baptized by Rev. A. M. Santandreu July 31, 1889, and were sponsors Ricardo Cervera and Maria de Laveaga"; and then also this item: "Isabel Sophia Luisa was born of the above parents June 21, 1895, and was baptized by Rev. A. M. Santandreu July 5, 1895, and were sponsors José Vicente de Laveaga and Maria de Laveaga"; and then this item: "Ramon, 1905, born of R. T. de Caleya and of Maria Cebrian, sponsors Edward Cebrian and Maria de Laveaga."

By the parents above named in this statement, reference was made to Mr. and Mrs. Cebrian, except the last one; the parents were Mr. and Mrs. Caleya; the last baptism took place in 1905.

All the acts of Maria when he saw her in church were rational; this was true of every occasion; her acts, conduct and demeanor were those of a rational person; on one occasion years before the fire she gave him $200 for the poor; on another occasion after the fire she gave him $500 for the church.

CONVERSATIONS WITH EDWARD J. LE BRETON.

Father Antonio knew the late Edward J. Le Breton, had conversations with him, met him in 1898 to consult him about a loan to be made to a parishioner; he said, "Father, don't touch it"; on another occasion he consulted him about a deposit in his bank, "The French Bank," on California street

between Kearny and Montgomery streets; the statement made by Le Breton as to the conversation in the Catholic book store on Taylor street, in 1898, Father Antonio declared to be incorrect; it was about a matter connected with the estate of one Aurrecochea, in which there was some discussion between them as to reimbursement of a certain sum which the priest had laid out for church services, masses and money to the poor; Le Breton objected to paying him until the court passed upon it, but the priest tried to prove to him that his claim was as just as it could be. They argued upon the point and Father Antonio remembered that he gave to Le Breton this simile: If a member of a well-to-do family bought a rich shroud for the corpse of one of that family the judge would never object to it, so, the priest said, neither would the judge object to the payment for those masses and the gift to the poor, it being in compliance with what the priest thought was the wish of the deceased; but Le Breton did not accept the simile, saying he did not admit the comparison and that finished the discussion as to that matter at that time.

The conversation that occurred at the priest's house in June, 1907, was not accurately related in full by Mr. Le Breton; he said that if the will was broken he was sure that Miguel would give the $5,000 left "to the poor" to "the church," meaning the Church of Guadalupe, of which Father Antonio was pastor; Le Breton said that it was intended for "the poor" and the church was poor enough. He told Le Breton in answer to his assertion that she was incompetent, that Maria was competent and then the subject dropped. At that time Le Breton gave the priest a check in the Aurrecochea matter in settlement of the dispute about the masses, and that ended that incident; he said that as he had laid out the money that he should be repaid. He spoke about the guardianship of the boy, José Aurrecochea. The conversation in the priest's house took a half hour or three-quarters of an hour.

CONTRADICTS LE BRETON.

Father Antonio did not say to Le Breton that Doña Pepa would take care of that, meaning the $5,000 to the poor, or

that Maria did not know how much she had; the priest had not the remotest recollection of saying what Le Breton attributed to him. Father Antonio told Le Breton that when he heard she made a will he was glad because she would sure remember their church, Guadalupe; afterward he was sorry she did not leave any, but when he was told the dates, he understood how that occurred, as it was so long before; Father Antonio had an opinion as to Maria's soundness of mind; she was of sound mind, rational in all her acts, devout, sensible, no crankiness; no queerness in her conduct, so far as he saw; if she had acted odd he would have seen it, as she was near the altar; that embraces the whole subject; all her acts formed the basis of his reason and opinion. In his cross-examination Father Antonio said that when Maria gave him the $500 after the fire it was a check in an envelope; handed him by her, signed by her; Edward Cebrian's name was on the back, Father Antonio indorsed it also and thought that he deposited it in the French Bank; he thought it was drawn on the London and Paris or the Anglo-Californian, he did not remember whether he collected it himself or deposited; she gave him the check in the temporary church edifice. The $200 she gave him in her own house, in money, before the fire.

WHY FATHER ANTONIO WAS CHOSEN AS ADVISER.

The reasons why he was chosen as an adviser, although not a lawyer, by Mrs. Cebrian may be gleaned from this epitome of his evidence. He had had some misunderstanding with Edward Le Breton concerning a benefaction in an estate of which Le Breton had executorial charge and he seemed to connect the latter's long deferred settlement of the dispute with a desire to secure an opinion that Maria was incompetent to make a will; but Father Antonio was not to be convinced by any such method. He believed to the contrary for the reasons stated by him.

FATHER ANDREW GARRIGA'S ACQUAINTANCE WITH THE FAMILY—HIS OPINION OF MARIA'S COMPETENCY OPPOSED TO THAT OF FATHER ANTONIO.

Father Andrew Garriga, the predecessor in the pastorate of the Spanish Church of Father Santandreu, was of an op-

posite opinion as to the mental competency of Maria. He arrived in San Francisco in November, 1868; shortly after his arrival he made the acquaintance of the De Laveaga family, they used to frequent the church at which he was stationed and he knew them from the very beginning; he visited their house sometimes and he would have lunch or dinner there during a period of twenty-one years; he knew the father and the mother and the two aunts and the children; from 1868 to 1891 he knew the family; knew Maria very well, she was rather simple-minded, "short of intelligence"; there was no change in her as long as he knew her; her intelligence did not develop with her age; she was constantly accompanied by somebody, a member of the family or a chaperon who always spoke for her; she was not extraordinarily bright; he observed no change in her mental condition from the time he first saw her; she was not an idiot, nor insane, nor anything of the kind, but a sort of grown child; made some progress in her catechism, not much; she was short-minded. This is, according to this testimony, the full measure of her mental condition from 1868 to 1891, from her twelfth to over her thirtieth year, within two years of the date of the will, February 15, 1893.

It is to be noted that Father Garriga's acquaintance antedated and was of longer duration than that of any of the other gentlemen of his profession who testified in this case. For twenty years prior to the time at which Father Antonio first met her, Father Garriga was familiar with the growth of her mind, with her religious instruction and the progress that she made therein. He was certainly an intimate acquaintance, as well as a religious adviser.

FATHER GARRIGA'S REASONS FOR HIS OPINION AND HIS OPPORTUNITIES FOR OBSERVATION.

Father Garriga gave it as his opinion that Maria was not of sound mind, "not like an idiot or insane, but like an undeveloped mind, rather short of intelligence," and his reasons were that her actions were like those of a child, and the way that he saw that the family took such great care of her, and

that she was regarded as a child, and the way she answered when he spoke to her, which was very rarely, she would answer a short word and kind of shut her eyes and turn the face a little one side and she would seem to be troubled with modesty or shyness; he did not consider her capable of carrying on a conversation; that was what he believed; she was not of complete mind. Father Garriga's opportunities of observation were more extended than that of any of the other clergymen who testified on this point, taking in twenty-three years, from the time she was 12 until she was 35; and he is not contradicted in any material point as to the facts which he observed during that period. In addition, it may be said, in connection with his testimony, that Mrs. Cebrian refers to Father Garriga in a letter to the contestant dated April 29, 1898, as an intimate friend of the family; as one entirely familiar with the family.

It appears, then, that Father Garriga is approved as one who during the twenty odd years of his pastoral relations to this family had exceptional opportunity of considering the mental condition of the deceedent and he gave his opinion and his reasons and the details of his observations.

FATHER VALENTINI'S CORROBORATION OF FATHER GARRIGA.

Father Valentini corroborated Father Garriga. Father Valentini was a native of Italy, came to San Francisco on October 20, 1868, and the event was indelibly impressed on his mind, as it was the eve of the great earthquake of that era, and he thought it was a remarkable reception, and resided here continuously until the first Sunday of October, 1872, he was stationed at Saint Francis Church on Vallejo street; he was not pastor of the Spaniards, Father Garriga was at the same church and had that charge, but on account of his own knowledge of languages he ministered to the Portuguese. Spaniards and others, chiefly to the Italians to whom he devoted his more particular attention, but being proficient in Spanish he aided Father Garriga in his ministrations to those people; he became well acquainted with the family of the elder José Vicente de Laveaga within a few months after his arrival, in the beginning of 1869, and

saw the family almost every Sunday; he visited their house sometimes while they were on Stockton street; he was absent in Half Moon Bay—Spanishtown—when the family lived on Geary street; from there he came up regularly twice a month, and on some of those occasions, not always, occasionally in the company of Father Garriga he visited the Geary street house and remained to luncheon and dined there several times; he was six years and a half at Half Moon Bay, until April, 1879; during those visits he saw Maria almost every time; after he left Half Moon Bay he went to San Pablo for two years and then to Stockton for less than a year, then back to St. Francis for two or three years, then to St. Vincent's in Marin county for a year and a half, and finally to Sausalito, where he has been ever since. During his visits to the de Laveaga family he had observed Maria, but he had had no conversation with her; some sign of recognition was all he could get out of her, but no talk; he never remembered her having any conversation with others when he was present; he had a most decided opinion as to her soundness of mind; from his acquaintance with and observation of her she was not sound in mind; he saw no change in her in the last three or four years that he knew Maria.

FATHER ANTONIO CORRECTS A MISTAKE.

In reference to the check for $500, Father Antonio testified that he received from Maria, he made some mistakes which he subsequently undertook to correct on redirect examination; he first testified that she handed him the check signed by her on one of the two banks named; when the check was shown to him on redirect he said that that was the check he received in an envelope from Maria; Edward Cebrian was with her when she handed him the envelope; when he opened it he found the check which he identified on the witness stand, and which he afterwards deposited in the French Bank. The check reads:

"San Francisco, Cal. Aug. 17, 1907, No. 71.
Up town Branch
California Safe Deposit and Trust Company
Pay to the Order of M. C. de Laveaga $500.00
Five Hundred 100/100.....Dollars.
Clearing House No. 14 LOUIS de L. CEBRIAN
(Endorsed)
Pay to the order of
REV. ANT. M. SANTANDREU.
M. C. DE LAVEAGA."

MARIA'S LACK OF KNOWLEDGE OF HER AFFAIRS.

The check itself did not tally with the first testimony of Father Antonio and it is argued that he was confused in memory as to two transactions, as evidenced by the check book stub and the check itself No. 71, and that when Maria handed Father Antonio the envelope, it was sealed and she did not know its contents; she was not cognizant of the fact; it was the act of Cebrian, senior, who made the entry in the stub book; and this was true as a rule, that she had no actual knowledge of what was done with her own moneys; others were her almoners; and this is shown by the testimony of Petronila Velasco. Mrs. Velasco came to California in 1889 and first met the decedent and the Cebrian family within the twelve months thereafter in the house 1801 Octavia street; she was a seamstress at that time, was introduced by a friend not for the purpose of engaging to sew, but just as friends; she came to know Maria very intimately and saw her frequently, often called there as a visitor, was a guest at the breakfast, luncheon and dinner table, slept over night there and made all Maria's dresses, and also for all the Cebrian family and sometimes for Mrs. Welch that used to be Julia de Laveaga, Miguel's daughter; she went with Maria together to church festivities and to see some poor at times, shopping, for a walk in the park and many places, and different times to the theater. Mrs. Velasco lived in San Francisco until the fire, April 18, 1906; she was at the Cebrian house at that time; they all went to the Presidio together and slept there that night; they went shopping together before and after the fire. Maria would ask her to go and select

the material as she wanted the goods for Mrs. Velasco's taste; and she would say, "select a good piece and take yards enough to make a coat," and the like; she had no care for fashion; she was not a society girl, wanted what was plain and comfortable; she had her ideas about such matters; she asked Mrs. Velasco to give money for the poor and for masses; when they were alone in her room Maria spoke to Mrs. Velasco very intimately about her trouble—about her ideas—she was a saint, not like society people; they cannot be saints; but she was devout, prayed every day a novena, read religious books, no novels; gave the Cebrian children religious instruction; she sewed beautifully; read newspapers in English, French and Spanish; talked in English and Spanish every day; spoke some French and some English with the children; she went out with them for exercise; she liked traveling very much and spoke about her travels, fond of Paris, talked about all the places she visited; had a good memory, sound mind, "always normal like anybody."

MARIA DID NOT KNOW THE EXTENT OF HER PROPERTY, MRS. VELASCO'S OPINION.

Mrs. Velasco was surprised when she learned after Maria's death that she left so large an estate and so little for charity; she did not think Maria knew how much property she possessed. Le Breton had visited Mrs. Velasco after Maria's death and tried to impress on her mind the idea of incompetency, but she did not agree with him. Maria did not dispense her charities directly, but through others, she did not want to be known in these matters, did not want her name mentioned; so when she gave alms to Mrs. Velasco for the poor or for masses she requested that nothing be said of the donor.

After the deposition of Mrs. Velasco was read on September 14, 1910, she appeared on October 25th, and was recalled by proponent and testified that during the month of September she was absent in Mexico, leaving San Francisco about July 1st; she had been in court on various days before she went to Mexico; she told Mrs. Cebrian before she went that she was going. Mrs. Velasco said finally that as to

any and all conversations she had had with Maria that the latter was very rational; her conduct and acts all rational; she was of sound mind; very religious without ostentation; she had good sense; her conversation showed a good mind; many of her acts indicated that she was rational.

Of the persons taken to Europe by Ignacia to accompany herself and Maria, one was Juanita Laveaga, whom Mrs. Cebrian in her testimony described as a distant relative. Her deposition used in this trial was taken at Durango, Mexico, where she has lived for thirteen years. She was married in 1889 to one Juvenal Valdespino and at the date of the deposition answered to the name of Juana de Laveaga de Valdespino. From her birth until 1880 she lived in San Dimas, Mexico, and in May of that year went to San Francisco and in July went to school in St. Rose's Convent, where she remained until December, and leaving there she went to the house of Mrs. de Laveaga, that is the Señora Doña Dolores Aguirre de Laveaga, the mother of Maria Concepcion, at 322 Geary street; she knew Ignacia and Maria, who went to meet her on the ship when Juanita arrived in San Francisco. From that time until she became an inmate of the household on Geary street in December until April, 1884, saw Maria every day, except for a short period when they went to the country for about two weeks one year after she began to live in the house; besides Maria there lived in that house in the year 1880 Doña Dolores, the mother; Doña Ysabel, an aunt; Ignacia and Vicente. In April, 1884, Ignacia and Maria left for Europe, taking with them Juanita and Celestine and two servants, Crescencia Martinez and Diega Hernandez.

JUANITA LAVEAGA, COMPANION OF YGNACIA, AND IN EUROPE WITH HER AND MARIA—HER CONSTANT OBSERVATION OF MARIA AND OPINION.

Juanita was with them all the time in Europe until Ignacia died, and after that they returned to San Francisco with the Cebrian family and Maria, and lived with them until November, 1888, when she departed for Mazatlan; the position Juanita occupied in the de Laveaga household was that of a relative, she did no household work, but acted always as a

companion to Ignacia, "Nacha"; nursed her when she was sick; she spoke frequently to Maria, observed her constantly, noticed what she did, when she arose, ate at the same table; she described with great detail her observations and stated that in her opinion

MARIA DID NOT ENJOY HER COMPLETE MENTAL FACULTIES;

she was not sound; her reasons were she could not be allowed to go alone in the street because she would have been lost; she played with the children the same as they; her opinion was never taken in the house with regard to any matter; she did not know how to chose her clothes nor her hats, never expressed any desire; did what she was told; everything about her revealed the intelligence of a child of young age; she never saw Maria doing needlework or crocheting, hemstitching or anything apart from a little "tatting" now and then; she required assistance in reading and writing letters. Juanita and Maria were schoolmates; one of their teachers, Miss Callahan, testified that she taught the two jointly; Maria made very little progress, practically none.

TESTIMONY OF TEACHERS AS TO MARIA'S PROGRESS IN STUDIES.

Mrs. Macomber, who was her first teacher, said that she taught Maria for a year at her home, tried to teach her English and music; Maria made no progress in either; she could speak English; taught her in the primer but with scant success; could not understand as quickly as another child; could not impress her or make her remember nor do anything with her; had more difficulty with her than with any pupil she ever began with; never could get her to learn her notes from the book that children of five or six years of age used, a book for primary pupils; Maria never got as far as the scales in music; this was in October, 1875, and from that month until June, 1876, at that time Maria was 15 or 16 years of age; Mrs. Macomber said she could not see any improvement in her; she thought her intellect was feeble, that she did not understand well; she could not read a word in English. Mrs. Jenny, then Miss Kate Golden, who was a sister of Mrs. Macomber, taught her afterward when Juanita was also her pupil; she said Juanita was a noisy little girl

of six years when she was teaching Maria; in fact she was 14 years old at the time; Mrs. Jenny said that Maria read English newspapers every day, read Louise Alcott, the Lives of the Saints and other books. Miss Callahan who followed Mrs. Jenny as teacher for four months said she understood English, but could not converse; she could get her to nothing higher than the primer, could not get her through the primer, it was like teaching a child of 6 or 7 years, while teaching Juanita was as if she were instructing a mature person; at the end of four months Juanita went into grammar and literature, but Maria remained behind; did not seem to make any headway in her studies. Juanita was much younger than Maria in years, but in mind much more advanced. The testimony given by Juanita, Mrs. Valdespino, in her deposition, is corroborated upon the points indicated in these particulars by Mrs. Macomber and Miss Callahan, although it does not agree with Mrs. Jenny; it leads to the inference that the latter was mistaken in her high estimate of Maria's intelligence, as she certainly was in her statement that Juanita was a little girl of 6 years of age when she first met her, whereas she was really 14.

IMPRESSIONS OF WITNESSES AS TO AGE OF MARIA.

Now as to this impression of witnesses as to the age of Maria; Miss Ainsa knew Maria in 1884, intimately she said, and yet she believed her to be a child of 12 or 14 when she in fact was 28. She said that she had never met and spoken to Miss Maria before the latter went to Europe with Ignacia; she had been acquainted with Ignacia and visited her on Geary street; at that time Maria was going to school and she did not come into society because she was very young, she was like a child, not yet entering into society. Miss Ainsa visited Ignacia about once a month up to the time they went to Europe; she saw Maria when she went to the house but the latter would go in and out like a child and Miss Maria never spoke to her; and yet Maria was at that time 28 years of age. The mother died in 1882 when Ignacia took formal charge of Maria, although she appears to have had actual charge of her prior to that time. Miss Callahan testi-

fied that when she went to teach Maria in 1880 Ignacia engaged her. Maria was then over 20 years of age and it is argued that she might have engaged her own private tutor in English.

Mrs. Aguirre said that when she knew her she never saw her exercise a will of her own; Maria appeared like a little child, not capable of governing herself; members of the family or servants were always around and they would ask her if she wanted this or that; did not seem capable of conversation when talked to. Once Mrs. Aguirre asked Maria how old she was and Maria turned to Ignacia who said "she is 21."

CELESTINE WALKER, FORMERLY HALPHEN, ONE OF THE GROUP THAT WENT TO EUROPE WITH YGNACIA AND MARIA.

Mrs. Celestine J. Walker, formerly Celestine Halphen, who was one of the group that went to Europe with Ignacia and Maria, in 1884, first made the acquaintance of the family about 1870, and she was a single woman, keeping a store, dressmaking and fancy goods, on Third street, between Howard and Mission. She did some dressmaking for them, beginning about 1870. She was acquainted with all the family, including Maria; she could not tell how old Maria was at that time; she continued to work for the family, sometimes on Stockton street, not every day, but three or four times a month, for the mother and the daughters and the aunt, Isabel; after the death of the father they had her buy everything for the mourning of the family for themselves and the servants; from that time on she continued in the same way with them, visited their house, took many meals there, generally saw Maria there; she was around the house; did not seem to do much; it was Ignacia who sent for her to go to the house and she continued doing so until they all went to Europe in 1884. She never saw Maria doing anything, only sometimes crocheting; she used to call it "tatting," some kind of needlework (narrow edging like crochetwork, but it is not crochet work; but some kind of work the same style; a little kind of edge for anything one wants, like handerchiefs, collars or something of that sort). She never saw her doing anything else. When they reached Europe they first went to

Paris; she lived with Ignacia in Europe for about four years until Ignacia died. They lived in hotels for some time and then went to keeping house; the household consisted of Ignacia and Maria, Juanita, Celestine and two servant girls,

CELESTINE'S POSITION IN THE HOUSEHOLD OF WHICH YGNACIA WAS THE HEAD.

Crescencia and Diega. Celestine's position was to be always at Ignacia's orders, and to be with her all the time, go out and get anything she wanted, go and change her drafts when her brother sent them to her and also to Maria and bring the money to Ignacia. Celestine paid the most of the bills for which Ignacia gave her the money. When they went out they usually went together, that is, Ignacia and Maria, Juanita and Celestine; she went shopping, to church, to the theater, they did not work very much, driving or riding nearly all of the time. Maria never said much; she passed her time looking around, seemed to enjoy what she saw, enjoyed the outdoors a great deal; Maria never bought anything for herself, Ignacia usually selected what she purchased, and it was the same about that in San Francisco; she talked very little; if one would say to her, "Do you think your dress is nice?" she would say, "Yes, it is nice"; she would like to go to the theater; Celestine always went with her in Europe; she never knew any plot, but she liked the singing, the ladies, the dresses and the music and what was going on, but she never thought anything about the plot. She went to church in Europe, the four went together and sometimes Celestine went alone with her, and sometimes Maria went with some of the servants. Maria never went out doors alone. While in Europe they went to Italy, Spain, Portugal, Holland and Norway. When they were traveling Maria would never have anything to say as to what she wanted to see or where she wanted to go; Ignacia head of all; Maria spoke English and Spanish; she never heard her speak any other language; Celestine herself was French by birth; Maria liked to hear music, but she never saw her playing; she never saw her write anything but her name and Ignacia assisted her on that occasion; in the matter of spending her money she was di-

rected by Ignacia; Celestine was married twice; her maiden name was Pandello; she was first married in San Francisco to one Halphen and she was a widow when she went to Europe with the de Laveagas; at the time of giving her deposition she was married to a man by the name of Walker, living in Los Angeles. Juanita's position in the household in Europe was to room with Ignacia; she was constantly with her, night and day; she did not do the work of a maid; she was a friend and companion. Maria never suggested anything as to what was to be done, but she was pleased when anybody else would make a suggestion; she never had her own plans.

WHATEVER IGNACIA SAID WAS LAW.

Maria never had anything to do with regard to the accounts; never saw her counting money or counting up bills or anything of that sort. Maria never gave any orders to anyone for anything. In Rome, when Ignacia was taken ill, they were staying at a hotel, and Celestine gave the directions as to what was to be done at the instance of Ignacia; they had connecting rooms, four in all; the hotel people took care of the rooms, but Celestine looked after the people to make known the wants for their accommodation. Maria never gave any instructions or directions about the care of the rooms or anything pertaining to their stay in the hotel or the management of affairs. At the beginning of Ignacia's illness she requested Celestine to take Maria out; she did not want Maria to be about, as she was afraid that she might herself become ill if she remained in the house, so she desired Celestine to take Maria out and to go and have some amusement, music or anything that was to be seen, to keep her out of the house.

MARIA DID NOTHING IN THE HOUSE

during the illness of Ignacia; did not write any letters that she knew of. Maria never requested her during the illness of Ignacia to send any word to Mrs. Cebrian. Mrs. Cebrian herself wrote to Celestine to let her know how her sister was, the way she got along and she wrote and said she was not exactly very well, she was ill and that if it came to the

worst she would let her know and she did, and she telegraphed to her and Mr. Cebrian came. Maria did nothing about notifying Mrs. Cebrian, only she saw Mr. Cebrian's letter and Celestine told her "there is a letter from Pepa," and Maria went inside to tell the others. Maria never said anything about the illness of Ignacia, she looked at her and that is all; there were doctors and attendants, but Maria never consulted with them; there were operations upon Ignacia, but Maria never said or did anything about them. During the period that Celestine lived with Ignacia in Europe she never received any compensation from either her or Maria; there was no talk of salary, it was all friendship. Juanita was a constant companion of Ignacia's, always with her, sleeping in the same room and doing everything that she wanted; next room was occupied by Maria; the door between the two rooms usually opened; but she was never called upon to do anything for Ignacia.

CELESTINE'S OPINION: MARIA NOT OF SOUND MIND—BASIS FOR THIS OPINION.

From her acquaintance with Maria, Celestine was of opinion that she was not of sound mind; she was childish, like a child 10 years old, and she would play and act like children do, having no harm in her and always pleased with anything. Celestine related many incidents as a basis for her opinion. The last time that Celestine saw Maria was in Paris, after Ignacia's death, about April, 1888, when having been dismissed by Mr. Cebrian, she returned to the United States. She never saw Maria reading much; she saw Ignacia read constantly, but not Maria. Celestine spoke Spanish when she came to this country, which language was acquired at her home, which is not very far from Spain. She had said that she received no compensation for her services during the whole period in which she was in Europe. She attended to the purchases for the ladies and acted as an interpreter and general assistant to them, and she had been paid nothing; but after her dismissal she presented a claim which was subsequently settled and she accepted something over 12,000

francs from Mr. Cebrian, in full of all demands against Maria and the estate of Ignacia.

THE SERVANTS IN THE HOUSE—CRESCENCIA AND DIEGA, THE REMAINING MEMBERS OF THE GROUP WITH IGNACIA AND MARIA. CRESCENCIA'S NARRATIVE AND OPINION.

Crescencia Martinez was one of the two servants that went in 1884 to Europe with Ignacia and Maria, Diega Hernandez being the other servant; she had worked in the family in Geary street in San Francisco beginning in 1877, as chambermaid; Diega was the cook; they traveled in various places in Europe and stopped at different hotels, and for a time in Paris had a house or flat with seven or eight rooms in it. Ignacia and Maria occupied the two front rooms; Juanita occupied the room with Ignacia and there was a room separately for Diega and Crescencia; after they left Paris they went to Rome and stopped at a hotel; in that city for a time they had a German girl named Elise Sitter; it was there that Ignacia became ill; Maria was there during the illness; Crescencia saw Maria always in that room where Ignacia was ill; she talked with her several times; Maria would say to her, "Crescencia, what shall we do? 'Nacha' continues sick; if Pepa was here (or Señora Cebrian, as she called her sometimes) we would try and see how we could be better pleased or more comfortable, or arrange matters better." Crescencia heard a conversation between Maria and Ignacia when the latter said to Maria that she had received letters from Mrs. Cebrian and at other times she told her to write to Mrs. Cebrian, and sometimes she would say to her, "Juana is writing to Mrs. Cebrian," and then Ignacia would say, "I am sick, Maria, so it is about time for you to comfort yourself," meaning to resign herself to the situation, which is a customary expression used when a person is dangerously ill or apprehending death; Ignacia used to tell all of them to resign themselves, or conform to the anticipated event. Ignacia was about eight days in bed; when the doctor would come Maria would ask him as he left the room, how the sick one was; he did not remain long; used to talk a little to Maria and some to Juanita who was with "Nachita," as they always called

Ignacia. Maria used to say to Crescencia that the doctor was not very good because "Nachita" did not get better. All they talked about was that Ignacia was very ill and that she did not seem to get better and what would they do if she died. An operation was performed on Ignacia and afterward Maria and Crescencia had a talk in which Maria seemed to lament the fact that the operation had been performed and she did not think it would bring about any good results. Before Ignacia became ill they all traveled a good deal about the city; went to mass at St. Peter's and at other churches and to other places of interest, such as the Vatican and Maria spoke of the many things that were seen, explaining to Crescencia what they signified; they visited ruins and picture and art galleries and palaces; when there was an audience they entered to see the Pope on several occasions; were at a ceremony of the canonization of the saints; Maria said that the ceremonies had been very pretty, very nice; she liked them so much, she was so happy that she gave thanks to God that she had been in Rome; Crescencia had several conversations with Maria about what she had seen in other cities. Maria would read from papers in French, Spanish and English; she read the French paper in Paris, France; she spoke French just as well as she spoke English; Crescencia, herself, did not speak either French or English, Spanish for her. Maria was very devout; she went to the different churches; in Rome, for instance, she saw her kneeling down for the devotions, like all the "niñas," the "girls," do, and act like other worshipers; in Rome they kneel on the floor in the churches, they have no pews nor any seats. They visited Lourdes, all the family together, and Maria spoke about the great miracles that the Virgin had performed. Maria made Crescencia a present of several books, one a mass book and a book of devotions to the Sacred Heart; this was in San Francisco; these books were burned in the fire; in the two books Maria wrote Crescencia's name and the number of the street and house on Geary street, and a verse about "If this book should be lost, I beg the one that finds it—" she forgot the remainder of the little verse of poetry; she made her other presents of money, Christmas gifts, when she had a baptism, or on Christ-

mas eve sometimes, once a hat, another time a cloak, a dress, rosary, scapulars, which Maria had blessed for her by a priest at St. Ignatius, where Maria took her for that purpose. Crescencia frequently saw Miguel and Maria talking together at the house on Geary street; in all of the conversations she had with Maria the latter appeared to her as a rational person, one who is in accord or in straight mind, Maria's acts were those of a rational person. Crescencia's reasons were that she never saw Maria do anything but that it was from a person of sound mind. When she saw the Pope it was at a devotion of the Pilgrims when he went around and bestowed his blessing and gave medals and offered his ring to be kissed; saw him up in the chapel, also at the ceremony of canonization "Nachita" died on the 18th of February, 1888; Crescencia did not recall the date of the month she left Rome for Paris; Ignacia died on Saturday, funeral services were on Sunday; her body was placed in a vault; Crescencia went to Paris with the Cebrian family; "la niña Maria," Juanita, Diega and herself; they went to the house on "Rue Cimarosa"; Maria and all went there; she was a chambermaid in the house, she was not present in the parlor when the visitors were entertained. Crescencia said she was 68 or 69 years of age at the time of the taking of her testimony.

DIEGA'S STATEMENT THAT MARIA ALWAYS ACTED LIKE A CHILD; DEFICIENT IN CAPACITY.

Diega Hernandez, who was a fellow-servant in the house with Crescencia, testified in her deposition that she was 53 years of age and first went to San Francisco in the year 1883; she did not remember perfectly the length of her stay, but it was about eight months, arriving about the month of July, 1883, and leaving about the month of March, 1884; she became acquainted with Maria Concepcion de Laveaga about the month of September, 1883. In the month of March, 1884, after entering the service of Ignacia, she went to Europe with her and with Maria and others who were attached to the household. They left San Francisco for France and were constantly traveling out of France, Paris being the principal place of their residence; they went to Germany, Austria, the

Tyrol, Denmark, Sweden, Italy and other points which she did not remember perfectly, until the year 1889, which was about the date of their return to San Francisco; Diega was constantly living with Maria until the year 1901, with the exception of three years of this interval, she did not remember just then which years those were; she did not know either the father or the mother of Maria; Ignacia and Maria were living together; Ignacia took a house in Paris where she lived with Maria, Diega being with them; they always traveled together, never separating from them, until the death of Ignacia in Rome; after that in 1888 Diega remained with Maria, returning to Paris in company with Mr. Cebrian who had attended the obsequies. Diega resided subsequently in the household of Mrs. Cebrian and came back to San Francisco with them and remained there until she came to Mazatlan. During all the time that Diega lived in the house of Ignacia, Maria lived there and afterward with Mrs. Cebrian, and Diega lived in the same house with her and was constantly at her side in the family, speaking to her and observing her nearby in regard to everything.

Maria's actions and acts were those of a person of few years, like a child; she was meek, charitable, good, of good heart and very simple in her speech; during all the time that she knew her, simple in her acts; she did not have much capacity for her acts, during all the time Diega knew her. From the acquaintance Diega had with Maria her mental condition was such that, according to her observations she had to be assisted in her actions, inasmuch as she performed them as those of a person of a young age; and on occasions, for example, when they went to the store to make purchases with Ignacia the latter told her she should purchase this or that object which she needed, and in her turn she did so; as also it was always necessary to assist her in dressing, and in other acts, according to whether or not she was in the humor for doing it personally, which was sometimes; her mental condition remained always the same; she did nothing without the direction of the family and without consulting them. In her cross-examination Diega said she was not able to read or speak

the English language, she had never been in any school, never had any education only from her parents; she entered the service of Ignacia as an ironing woman, but in reality she was employed generally in doing all of the chores in the house, as general servant, from 1883 to 1888. After the death of Ignacia in the month of February, 1888, she immediately entered the service of Mrs. Cebrian and was employed by her as a nurse for her children, and for no other purpose, and she continued to remain in that capacity as general servant and nurse for children until she left for Mazatlan.

NORBERTA MARTINEZ IN INTIMATE CONTACT WITH MARIA FOR YEARS.

Norberta Martinez, at the time of testifying by deposition, was seventy-eight years of age, and was then living in Mazatlan, Mexico; she had lived in San Francisco from 1878 to 1906 continuously; during that period she knew Doña Dolorez Aguirre de Laveaga, the widow of the senior José Vicente de Laveaga; she did not live with her but daily went to her house to sew until 1882, in which year Doña Dolorez died in San Jose, and afterward at the request of Ignacia she went to live with them at 322 Geary street, San Francisco, that is, with Maria Concepcion and Maria Ignacia, until they made their trip to Europe in 1884; from 1882 to 1884 she lived at that house where Maria lived with Ignacia; during the time she lived with Doña Dolores she was there in the capacity of seamstress; after her death she was in the service of Ignacia from whom she received her monthly pay until Ignacia made her trip to Europe; the two sisters lived constantly together; Norberta was in intimate contact with Maria during all this time, except when Maria was away from the city traveling, spoke to her and saw her daily, talked with her and observed her constantly; accompanied her sometimes to the Park and very frequently to church; during the years when Norberta knew Maria the latter was very simple; she was continually praying and going out to walk with the children and with more frequency she went to church where Norberta accompanied her until the trip to Europe.

MARIA'S MENTAL CONDITION AS DESCRIBED BY NORBERTA.

With respect to the mental condition of Maria she was very simple, like a child, without malice, without decision, short of understanding, entirely without thought for scarcity of understanding; she had malice toward no one, "malice of nothing." During the years that Norberta knew Maria the latter remained the same in her mental condition. As to Maria's writing she did not write anything more than her name without direction. She depended for direction upon her sisters in everything. As to Maria's ability to write, one of the counsel for proponent contends that while she was not a practiced writer and inclined to be indolent in that respect, yet she could write and did write without aid; he claims that it is not established that her letters were copied from patterns prepared by others; that she was not a correct penwoman does not argue intellectual incapacity; many persons of scholastic and even university training are indifferent in their chirography and orthography; the signatures of Maria C. de Laveaga are examples of really beautiful handwriting; the very numerous signatures of Maria show excellence of a superior kind; the contention that she could not write more than her name is not borne out by the many specimens of her proficiency in this case; the exhibits prove her power with the pen sufficiently to manifest that she had the ability to write more than her name.

COUNSEL'S COMMENTS ON HANDWRITING.

This counsel also compared the handwriting of Maria with that of Ignacia saying that the former could actually write so that her writing could not be distinguished from Ignacia, a small but pregnant proof of competency; and the other counsel for proponent compares the manuscript of the will in question with Abraham Lincoln's chirography in the composition of the Gettysburg address, a facsimile of which he introduced where there was a failure to dot an "i," a common error; another letter of Lincoln's was referred to to show that his "i" was not usually dotted and sometimes the "t" not crossed. Horace Greeley and his peculiar handwriting and Shakespeare also were brought to show that mistakes in

writing and speech and departures from grammatical accuracy and corrections, errors in orthography, accentuation, interlineations, erasures, capitalizations, substituted words were not significant, and to clinch this argument proponent introduced a compilation of the mistakes of contestant in his letters. Concerning the mistakes made by Miguel in his letters to the decedent, Maria, 867 errors in omission of accent marks, in misspellings, interlineations, corrected words, crossed out, written over, figures, letters. In his correspondence with Mrs. Cebrian, Mr. Cebrian and to both jointly, 133 letters in all to them, there were 12,606 mistakes, misspellings, grammatical errors, accents omitted, interlineations, substituted words or letters, capitalizing errors, erasures; grand total, 13,473. Contrast this great number of mistakes with the errors claimed to have been made in her writings by Maria. From this comparison it is argued that the proposition that her handwriting indicated imbecility or unsoundness of intellect is shown to be without substance.

Counsel adverted to other letters of educated persons as replete with errors such as are criticised in this case, and said if such mistakes be a standard of unsoundness of mind then these letter writers cannot be said to be sane, yet this is the standard set up by contestant. If such errors be indicative of insanity, counsel asks, What shall we say of contestant with his multitudinous mistakes?

DISTINCTION BETWEEN ERRORS OF EDUCATED PERSONS AND MISTAKES OF ILLITERATES OR IMMATURE INTELLECTS.

There is a distinction, however, between errors of educated persons, such as are pointed out by proponent's counsel and the mistakes of ignorance or illiteracy, or those arising from the undeveloped intelligence of children, or those in the early processes of primary culture in correspondence, from which, it is claimed, Maria never emerged. In the revisions of manuscripts, the correction of proofs, the preference of one word for another, the selection of synonyms, the exact expression of an idea in appropriate phrase, every writer and every lawyer knows that before the final form is printed it is difficult to decide the precise mode in which the thought is to be con-

veyed; this comes from study, reflection, desire to be clear, many considerations which influence the author in his composition. It is not every writer that is gifted, as Shakespeare is said to have been, with such a facility and felicity of art as never to have made a blot or a blemish in his work, nor as, according to Pope, "the copious Dryden who wanted, or forgot, the last and greatest art, the art to blot." It is an idle boast that one never makes a mistake in manuscript, as proofreaders and typewriters can testify, for Shakespeares and Drydens are uncommon, and Sheridans remark still holds good, that your easy writing is curst hard reading.

MARIA'S ABILITY TO WRITE CONSIDERED—NOT A LINE FROM MARIA DURING LIFETIME OF YGNACIA—MIGUEL'S LETTERS TO MARIA AFTER DEATH OF YGNACIA—NO RESPONSE FROM MARIA.

Except for the signatures to various formal documents there is no writing of moment from Maria for over thirty years of her life, no scrap of writing, indeed, until the postscript to Mrs. Cebrian's letter to Miguel from Paris, May 15, 1888, which was:

"Muchos besos de
tu hermana que te quiere
mucho Maria."

This first specimen of Maria's handwriting hereinabove copied as nearly as may be, comports with the testimony of Norberta Martinez, that Maria's writing was like that of a child, commencing high up and ending low down, letters large and very much separated. She could only write her name without direction. The postcript speaks for itself in the original exhibit. She was then 32 years of age.

During the lifetime of Ignacia, Miguel had no communication in writing from Maria, none whatever. Ignacia conducted all the correspondence; while the sisters were in Europe from 1884 until Ignacia died in 1888, Maria made no requests of him, and after that none whatever, either written or oral, from her return to San Francisco until she went again to Europe; all the subsequent transactions were through Mrs. Cebrian. Prior to Maria's going to Europe with Ignacia in 1884, Miguel had never seen her write more than her

name. While Ignacia was in Europe before her death he received no word from Maria about the former's illness; she wrote nothing about Cervera's marriage to Ignacia, nor anything else from 1884 to 1888, nor thereafter during that period; not a line came from Maria while Ignacia lived; but subsequently a series of letters was started from Miguel to Maria, which, it is claimed by proponent, constitutes an estoppel on his part to question her competency. He wrote to her, for instance, on March 28, 1888, "I am now going to molest you with business matters"; this is a letter of great significance, showing that he treated her as a person of intelligence who understood her business affairs; it proves his appreciation of her interest in and desire to know about her property and its management and so he communicated to her a concise statement of its condition; this was not such a letter as one might write to a child, but to an adult of mature mind quite capable of comprehending her surroundings, the nature and value of her estate and her relations to it.

He wrote about forty more letters, but there appears no response in the record, and it is said that all these letters make answer to contestant's claim that she was mentally incompetent, and if anything could estop anybody these letters should estop him from making this contest. Wherefore should he thus write to a person destitute of intellect and incapable of apprehending an idea, in fact of infantile mind? In one of these letters dated September 10, 1903, there is a reference to a letter received from Maria in which he says: "Con mucho gusto recibi tu cartita de Agosto 10, felicitandome por el pronto casamiento de Julia"; and in this letter reference is made to her request for $10,000, in reply to which he sent $5,000. Maria's letter is said to have been lost. Otherwise the correspondence on her part is sparse and meager after the death of Ignacia, and before that there is none at all. Contestant's counsel explains this correspondence by saying it was all in pursuance of a purpose, Miguel never expected an answer from Maria, and she did not answer. Mrs. Cebrian answered him every time; the whole letter-writing to her was upon agreement to show in case of inquiry as to her competency; it was a device to mislead anyone who

might challenge her capacity; it was a family understanding. It may not be very creditable to anyone concerned, but there is reason to believe that this was a concocted correspondence.

CEBRIAN'S EVIDENCE AS TO MARIA'S ABILITY TO WRITE AND SPELL, SELF-CONTRADICTORY.

In Mr. Cebrian's testimony he says that Maria knew how to write and how to spell; that she wrote with facility, she wrote more readily than her mother, and less readily than her sister, as readily as people generally do; she was as good as the average in writing and spelling; he never assisted her to write a letter; and he did not remember that his wife ever sat down with her and made her write a letter, but he admitted that he had written a letter to Miguel from Paris, April 10, 1888, in which there was a sentence which in the contestant's translation was as follows:

"Maria has not written to you—you know how much work it costs her to spell. Pepa continues with her persistent cold and cough, therefore she has not been in the humor to sit down with Maria and make her write."

Mr. Cebrian said this was not a correct translation, because colloquial phrases are very difficult to translate; he said it should be, "you know how she dislikes to write and spell." The original is, "Tu sabes cuanto trabajo le cuesta deletrear." Mr. Cebrian explained that Maria was disinclined to write and that on account of his wife's cold and cough she was not able to induce her to write to Miguel.

MRS. CEBRRIAN'S STATEMENT ON THIS SUBJECT—HER LETTER THAT MARIA DOES NOT KNOW HOW TO WRITE.

Contestant's counsel, in directing Mrs. Cebrian's attention to the circumstance of the death of Ignacia, asked these questions:

"Q. Maria was with her, was she not? A. Yes, sir. Q. Did Maria give you any information about the sickness of Ignacia? A. Yes, sir, wrote once that she was sick. She was writing all the time."

This was Mrs. Cebrian's statement on that subject and about Maria's ability to write. It may be remembered in this connection that Crescencia Martinez said that Maria was writing from three or four letters, and that she saw her writing and took them to the postoffice, so that she knew that they were sent. But in a letter written April 19, 1888, identified by Mrs. Cebrian, as her own writing, occurs the following:

"Dear Miguel:

"Do not take it badly that poor Maria does not write you, the unhappy one. You well know that she does not know how to do it. If she had known how to write, they would not have concealed from me the state of sickness of Nacha, nor would they have written a letter in her name to a serving man they had in the Rue Cimarosa, the day on which Nacha died; a letter of which Maria knew nothing, nothing, and she had not given any idea of whom may have written it."

After this letter was brought to the attention of Mrs. Cebrian, she admitted that she had not received any letter from Maria during that sickness and also that the lines, "if she had known how to write they would not have concealed from me the sickness of Nacha," were underscored by her in the original.

COMPARISON OF HANDWRITING OF YGNACIA AND MARIA.

The conclusion from the comparison of one of the counsel for proponent of the handwriting of Maria with that of Ignacia is not fully established, if we take as standards the postscript written by Maria to Mrs. Cebrian's letter of May 15, 1888, and Ignacia's letter of June 4, 1885, in which she acknowledges a receipt of a draft for Maria; nor the letter from Maria to Miguel dated at San German, May 2, 1898, which reads:

"San German
Mayo 2 de 1898

Mi querido hermano Miguelito Desde
que es toy a qui en San German
es toy Yo mucho mejor. Mamie y
Yo estamos muy contentas con

estos Sr. y Sra., son los dos
muy buenos y muy obsequi-
osos. Su casa es muy bonita,
tenemos cuartos buenisimos
Dales muchos besos a
los ninos; tengo muchos
deseos de be verlos
tu hermana que
te quiere mucho

MARIA."

This letter is translated as follows:

"San German, May 2d, 1898.

"My dear brother Miguelito:

"Since I am here in San German I am much better. Mamie and I are very content with this Sr. and Sra. The two are very good and very courteous. Their house is very pretty. We have very good rooms. Give many kisses to the children. I have many desires to see them. Your sister who loves you much.

"MARIA."

This counsel says that Maria could actually write so that her writing could not be distinguished from that of Ignacia and that this is a pregnant proof of competency. With these two samples before the court, it is hard to agree with counsel that no difference is discernible between the two scripts. Ignacia's writing is fluent, regular, correct in composition and in form, such as might be expected from a person of her years and education, treating of many matters of mutual interest, altogether the product of an adult intellect, while Maria's letter in structural form and substance might be written by a child; it answers to the description given of the manner of her writing already quoted from the testimony of Norberta Martinez.

NO SIMILARITY BETWEEN THESE WRITINGS.

Certainly so far as these specimens are concerned, there is no similarity between the writings of these two women. Maria was forty-two years old when she wrote this letter.

On the same day that this letter was dated at San German, May 2, 1898, Mrs. Cebrian wrote from Cannes to Miguel that Maria had written to her and told her that she had written to him and said, "Miguelito will have a great surprise with my letter"; "is it no so? Maria wrote to the consul and sent him a certificate signed by the doctor that she could not come because of a nervous prostration. I hope that this will do and that there will be no other commissions to answer because these have me half dead." Maria and Mrs. Cebrian were twenty-four hours apart at this time, as the latter herself said, "She was in Los Angeles, for instance, and I was here; I could not know that she had written."

MARIA'S MOST ELABORATE EPISTOLARY EFFORT.

Perhaps the most elaborate effusion attributed to Maria is the letter dated at Paris, December 12, 1899, less than three pages of small note paper, in which she conveyed to Miguel her desire that the first day of the last year of the nineteenth century should not pass without his having her felicitation. She sends wishes for his good health and desires that he come over in the coming year with his children, for the exposition, because they would have much pleasure, and she very much desired to see him, for it was now three and a half years that she had not seen him; the works of the exposition were far advanced, some buildings almost finished; it was very pretty; she wanted him to give each one of the children money in her name the same as the year before, so that they might have a remembrance from her as she was not there to buy it herself. She concluded with an embrace from herself, his sister who loved him much, and desired that he should come to see her. Although this letter is dated December 12, 1899, three days thereafter, on the 15th, Mrs. Cebrian writes to Miguel: "At last Maria has now decided to write and she wants to begin with you. When you are in the humor send her four words urging her to write you." It seems strange that if this letter were already in existence, Mrs. Cebrian should not have known it, and not refer to what had been done as something still only in contemplation.

THEORY OF THE PREPARATION OF LETTER.

The theory is that this letter was a long time in process of preparation and that it was necessary to have Maria write something to exhibit as coming from her in case Maria's competency should be called into question; Miguel testified that he called for letters from Maria that he might show them and that these two letters were prepared for that purpose. Mrs. Cebrian in her correspondence with him, seems to admit that a duty had been imposed upon her to have Maria write something. On November 24, 1899, she writes: "Receive a thousand loving regards from Maria, who for a week says that she is going to write you." On the 30th of November, 1899, she says, "Maria salutes you and thanks you for the draft which she has received. She was going to the theater with P. and Cebrian. It is days since she says she is going to write you." And then two weeks later this letter is produced. In all the letters written by Mr. and Mrs. Cebrian prior to taking the deposition at Cannes there is no reference to Maria's writing, nor any excuse made for her not writing; but after that, Miguel testifies that he called for a letter from Maria which he might show, and subsequently came these excuses from Mrs. Cebrian in numerous letters, in which she spoke of Maria as promising to write to him, or that there was a letter being written, or that she would write to him soon, and so on for years. It is argued that prior to the deposition at Cannes, there was no necessity and he thought of having Maria write, but at that time, and after that time, Miguel was very anxious that she should do so and thus these letters came into existence; up to 1898 there is no letter from her nor any reference to any writing made by her; on September 6, 1901, Mrs. Cebrian wrote: "Maria always with the good intention of writing, with the laziness on the one hand, and the outings on the other, never finishes the letters commenced. She sends you a thousand remembrances, and also to your children and receive the same from all of us, and especially from your sister who loves you much." On November 15, 1901, Mrs. Cebrian says, "she will soon write to you but she has taken an incredible laziness to the pen and paper."

A GREAT LABOR FOR MARIA TO WRITE AT ALL.

Certainly these letters purporting to have come from her, short as they are, show that it must have been a matter of great labor in her to write at all, and although one of the reasons for writing to her direct was that she liked to receive letters, she certainly showed no liking to answer them, whether it was from her incredible laziness, or her inability to write. Miguel testified that during the flying trip of the Cebrians to California, this subject was discussed with Mrs. Cebrian and it was then agreed that there should be letters written. Mrs. Cebrian told him that Maria liked to receive letters, and so after that visit these letters were sent to her and also the drafts month by month, but the responses and acknowledgments came from the Cebrians, except in two or three cases. It is claimed that all of these letters ostensibly addressed to Maria were intended for the Cebrians and the fact that the answers came from them and not from her seems to sustain this claim. There is no reply on record from Maria to any one of the series of letters from Miguel, while the Cebrians were in Europe, but during their so-called flying visit to California in 1901, contestant wrote three letters to Maria who remained in Paris and sent five drafts, to which the only response came on a postal card, not postmarked, which acknowledged the receipt of three drafts. This postal is an evidently labored effort, six or seven lines in length, and bears some aspect of aid in its composition or writing. Maria was forty-five years old when that was written. As to the other writings and postals ascribed to Maria, considering her age, they are not beyond the capacity of a child, leaving aside the suggestion that she was assisted in their composition.

MARIA WAS ALWAYS ASSISTED IN WRITING.

That she was assisted, even in the writing of a postal card, is quite plain upon inspection, for example, a card with the picture on one side of "Oradour-sut Vayres—Chateau Callandreau," and on the other side under printed "Correspondence,"

"Mi querido Miguel
me acuerdo mucho
de ti; Enesta casa
todos te saludan
con cariño. Maria.

Adresse (in print):
Mr. Miguel
de Laveaga
Geary St.
San Francisco
U. S. A. California."

The address was in the handwriting of Isabel. This postal was not postmarked, but sent under cover of somebody else's letter. Attention is directed to two letters, one dated Paris, March 5, 1901, and the other San Francisco, August 1, 1906, and comparison made to show that she was aided even in these simple writings. The difference between the capital F in the word "Felicitas" in the Paris letter from the F in "Francisco" in the other is certainly very striking. There are other marks on the surface that tend to show that she was materially assisted in the letter of March 5, 1901, sent to her sister Pepita in California, while Maria was in Paris in the house with Josephine Cebrian. The San Francisco letter of August 1, 1906, is very different in construction and if she were aided in that writing it was by another person than the one who was present in Paris five years before.

These writings constitute about all the contributions of Maria to the correspondence in this case. Many letters and postals were sent to her, but her responses have not been preserved, if ever made, except as herein put in evidence. She certainly was not at any time of her life a facile, fluent or frequent writer, although Mr. Cebrian says she wrote with facility and that she knew how to spell as well as the average, and Mrs. Cebrian testified that when Maria wanted to write she knew how to write pretty well and of course she knew how to spell, she spelled readily and easily; when Maria was 22 or 23 years of age she could spell and write as well as she could at any time of her life; but there is no writing here to support that statement. Outside of the few letters and postals here introduced she wrote nothing in the way of correspondence.

EVERYTHING WAS DONE FOR HER BY THOSE ABOUT HER.

It should seem that so far as Maria's ability to write ordinarily the subject was exhausted. The claim that she was a ready writer or a correct speller may be left to an inspection of the original documents; it is impracticable to reproduce them here in facsimile, but it is enough to say that they do not bear out the assertion that she was at any time equal to the average in either respect of those who had ordinary opportunities of education. In all there are only four writings of any length, besides the will, and six postal cards, attributed to Maria. Counsel for proponent says that Maria's letters evince memory, reflection, power of thought, interest in affairs, affectionate consideration for her nieces and are normal and intelligent, and quotes the letters just cited to prove this thesis, especially the letter from Paris, March 5, 1901, to "Pepa," Mrs. Cebrian, then in San Francisco, a well-composed and sensible epistle; thoughtful and kindly; as to this letter and its character sufficient comment and comparison have been made.

MARIA'S GENEROSITY TOWARD HER SISTER'S CHILDREN CONTRASTED WITH HER TREATMENT OF MIGUEL AND HIS FAMILY.

The same counsel alludes to the generosity of Maria, she gave $5,000 for her niece's child, then recently born, Isabelita, in 1904; "she was giving all her life, constantly bestowing benefactions on friends, relatives, dependents and others in need; the decedent was sound enough to make gifts of great value in her life and they were accepted with avidity by the donees." There is no doubt about this; there is not an instance in the record where anyone declined a gift from Maria; all of them were avid enough in acceptance, if not assiduous in cultivating their opportunities of obtainment. Why, it is asked, if she were competent thus to donate personal property inter vivos, could she not do so by will? One of the donations was a watch which her nephew Harry Cebrian testified that he received, said to have been purchased by Maria in Europe as a present for him and sent through his parents to him, and proved by the deposition of the salesman that it was bought by his father in Tiffany's, New York, three

months after her death. This counsel speaks of the trust and confidence reposed by Maria in her brother Miguel and her generosity to him and his ingratitude in return for all her kindness, now claiming that she was deficient in intellect and incapable of apprehending an idea of business, in fact infantile in mind.

MIGUEL'S CARE FOR HER PROPERTY WITHOUT COMPENSATION.

As to Maria's generosity to her brother Miguel, it appears that for thirty years he had received no compensation for attending to her affairs and that he had even relinquished his share of executor's commissions in the family estates; and the associated counsel for proponent contrasts the fact that she favored her sister's children in whom her affections were centered, giving them more liberal presents than to the children of "the metalized Miguelito," a most significant expression, an epithet said to have been used by her; all that came to Miguel's children were $20 apiece at Christmas, while the others in closer touch with her received munificent presents. Miguelito may have been metalized but certain it is that he bestowed great care without a penny of pay for himself upon this property. He was minute in his accounts and careful in his record of transactions to an extent that causes criticism of his exactitude in minor matters. He does not seem to have sought anything from her as a reward or otherwise for himself or his children; but she was in the habit of presenting them with these remembrances at Christmas. As an instance or illustration in this regard of the manner in which Miguel managed her affairs, there is a letter from Mrs. Cebrian of December 5, 1902, to Miguel: "Receive many remembrances from Maria who with much formality says that she is going to write you to tell you that you buy a remembrance to your three children in her name"; but no letter came and on December 24, 1902, Christmas eve, Mrs. Cebrian writes: "Maria gives me a thousand messages. She hopes that you have purchased them some little present in her name, for although she has the letter commenced for you, I fear this may have the fate of many others never to be concluded." Miguel answers this January 8, 1903:

"My very dear Pepa:

"As I was waiting the letter from Maria in which she would tell me to give a present to my children, I did not give them anything in her name on Christmas eve. I confess they were disappointed, but now with your letter, which says she wishes to give them a present, I gave each one of them twenty dollars as I have been giving them the past few years according to her request."

Certainly there is a contrast in the relative value of gifts, but no occasion to charge Miguel with ingratitude for Maria's generosity to him. The cause for gratitude might seem, in the circumstances of his attention to her interests, to be on the other side.

MRS. CEBRIAN RELIED UPON TO ANSWER FOR MARIA.

The letter of January 8, 1903, is urged to show that Miguel expected Maria to write and it may be that he did expect some note in her name, but the customary mode was, as has been repeated, that Mrs. Cebrian should act for her, and that for reasons already stated he desired the personal signature of Maria. Miguel wrote to Mrs. Cebrian on October 9, 1906:

"To-day I am sending Maria draft for 3780 francs which I had not sent her before because from day to day I was expecting she would advise me of the arrival of the one which I sent her in September, and that Cebrian would tell me if it would be better to send drafts in pounds. I am writing Maria under separate cover. I believe that it pleases her to receive letters, and am sending her a draft. Advise me if she receives it."

So on a previous occasion he wrote: "I send Maria under separate cover a draft; as long as she does not write, please tell me if she receives." Here it is patent that he was not relying upon Maria to answer his letters, but that Mrs. Cebrian was attending to the matter. That this is so appears from another letter, from Mrs. Cebrian to Miguel:

"Maria charges me to say that she received your little letter and she thanks you and gives you thanks for the two drafts which came with it. When she receives the other I will advise you."

THE ACCEPTED WAY OF DOING BUSINESS—MRS. CEBRIAN MADE ALL ARRANGEMENTS FOR MARIA.

It may be asked, why did not Maria herself advise Miguel of the receipt; the answer is that this was the accepted way of doing this business; she was not called upon nor expected to do anything of importance. Maria was constantly receiving letters and answering none, occasionally, perhaps, a missive to Mamie or a postal, but nothing of consequence to anybody else. Many letters and postals are here from others to which she made no response, no writings to those outside of her family, none to strangers. Some of her correspondents seemed to have a mania for multiplying manuscripts and wrote to her with great frequency without evoking any answer; but the sum of it all is that her necessary correspondence was in the hands of Mrs. Cebrian. The arrangements for her maintenance abroad were made with Mrs. Cebrian. Miguel was asked whether or not he had made any arrangements with Maria before she went to Europe as to how much money he should give her monthly; he said that he had not; and he wrote on July 29, 1906, after they had left for Europe, "I inclose for Maria, draft on London for £204–14–2, here $1000. If she tells me what she needs each month more or less I will forward her a monthly remittance"; but she did not tell him; it was reserved for Mrs. Cebrian to answer, and she wrote on August 15, 1896: "With reference to what you say as to how much Maria gets per month, for the time being I send her $750 on the first and if she has any over I will let you know, and if she needs more I also will advise you." Was Maria consulted as to this arrangement? What had she to do with the provision for her own necessities? The whole matter was managed between Miguel and Mrs. Cebrian, and Maria was only a name, she was only a pawn in the game that was going on between these people. Their common mode of transacting business was to leave Maria out of consideration, except to obtain her necessary signature, upon which Miguel insisted because he wanted her actual receipts. Cebrian desired that Miguel should deposit moneys here to his credit and he would pay Maria in Europe, but Miguel was wise to this suggestion, because he said he wanted

a voucher for everything he sent Maria and he answered Cebrian that "as to not remitting to Maria but placing it to your credit in the bank, I will tell you frankly that I prefer to send her the money, because the second of exchange is a receipt that remains with me, and you will know why." Cebrian answered that he understood why this was desired by Miguel. If Maria was competent, why all this roundabout business Why could not she attend to it herself? During the time they were in Europe, from 1896 to 1904, Mrs. Cebrian testified that she did not receive Maria's money; she did not receive any money from Miguel for the care and support of Maria; but in the letter from her to Miguel dated Paris, August 15, 1896, she acknowledged the receipt of money for that purpose. In another letter, March 23, 1898, she writes:

"Maria received the double draft which you sent her and I am very glad that it was so. Send her another in April and don't send her any in May. As I think of going in May I will leave her money on hand."

If Maria could attend to her own affairs, why not send to her in May, when Mrs. Cebrian thought of being away?

If the remittances were to be received by Maria why was there to be any change during the absence of Mrs. Cebrian? Could she not be trusted with the control of her own money and the cashing of her own drafts?

During the lifetime of Ignacia it has been proved that the latter attended to such matters, and for the four years from 1896 to 1900 Miguel advised her that Cebrian would tell her how to cash a check; and during the flying visit in 1901 Josephine testifies that "Father told us to go to the bank and collect them and I went with her when she collected the drafts in Europe during the flying visit, all of them"; so, it seems, that after all her experience of eight years in receiving drafts, during the short episode of the elder Cebrians in San Francisco, Maria had to be instructed as to how a draft should be cashed and after that she needed the aid and company of her neice in order to collect the money. Maria was then 45 years of age, and it might be presumed that she could cash her own checks without assistance.

MARIA ALWAYS ACTED UNDER GUIDANCE AND DIRECTION OF OTHERS.

It is claimed by proponent's counsel that Maria's signatures to these drafts and other important papers establish her competency, but it is shown that in such transactions she was always accompanied by others and acted under their guidance, and that seldom, if ever, did she exhibit any cognition of the contents of the important instruments she signed or formally executed. There is no evidence that she ever drew or read one of those papers, or discussed them, or even had explained to her their contents; and, indeed, it is too much to expect that as to the legal verbiage she should have understood them, much less have drawn them, but as to the substance and purport she might have obtained aid to her understanding from those who were acting for her and she had the right to rely upon their advice and act upon their counsel, as betokened by their superior judgment in matters not of common ken. One of these matters was the bond in the Safe Deposit receivership in which she signed as surety and which, it is said, was done by agreement in the family, arranged among them, and everybody acquiesced in the justice of it, and was strictly in accordance with what had previously been the custom and supervised by her sister and her brother. Joseph Vincent de Laveaga, attorney for the receiver, testified that he consented and took part in the giving of the bond because his father and aunt, Mrs. Cebrian, consented to it, and it was the way Maria's business had been transacted, because she had not been adjudged incompetent and his father and aunt were the only persons interested and they were all agreed. Joseph Vincent de Laveaga is denounced for his conduct in this transaction, in view of his opinion that she was incompetent, as deceiving the court, and his action is described as moral turpitude of the most depraved degree and type. While Joseph Vincent's action in this matter is censurable, it is of a piece with that of all concerned; they were all in the same case. He was striving to further his own interests, and they were all at that time in sympathy. Whatever blame attaches to one, the others are measurably blamable, he more, because, as an officer of the court, it was his duty to act with the utmost frank-

ness and candor, and to the extent that he did not do so, he is deserving of severe reproach; but that does not affect the fact that Maria was incompetent, it simply shows the common family purpose to keep her condition concealed.

THE COMMON FAMILY PURPOSE.

Everyone of these people was equally endeavoring at that time to prevent courts and public from knowing the family secrets, and, perhaps it may be going too far to blame them for desiring to maintain their own privacy and in affairs of business to carry out what they considered formalities, without exposing to strangers the infirmity of one of their own members. Whatever may have been their motive, what we are to look for is the fact of Maria's competency. Vincent said he acted in this way as in all her other business, and it was done in the best of faith and he thought it was a good bond. He may have been mistaken in his legal judgment, even ignorant of the law, without moral turpitude; all of the parties to the bond, including the principal, being financially responsible, he thought he was justified in his action.

In all transactions in the family Maria was treated as inferior in intelligence; this was recognized in their correspondence; it was a family secret, they did not desire it publicly known or made a matter of record; Ignacia wrote to Miguel in January, 1889, that if she had to draw on him for Maria, it would be better always to send the money in her (Ignacia's) name, "for you know her and to go or sign at the bank or before a clerk, the poor thing suffers"; but Miguel for his own security in disbursing funds wanted an actual signature, so he declined Ignacia's suggestion to dispense with it, a precaution justified by the future events; so he required a formal voucher signed by her; and Ignacia wrote in reply "you can send the money in her name, because if she signs once she can do so other times; the observation I made was to save her who is short the pain of doing it before people."

MARIA'S SHORTNESS OF INTELLECT ACKNOWLEDGED.

Here was a distinct acknowledgment of that shortness of intellect ascribed to Maria in the family circle. This is the

explanation of the caution exercised by the members of the family to guard from public view Maria's infirmity or deficiency. Mrs. Cebrian's letters written after the death of Ignacia are inconsistent with any theory of Maria's competency. She declared she wrote those letters to an intimate loving brother who knew Maria and she never thought of their coming out in court. So all of them closely guarded the secret and permitted Maria to perform perfunctorily acts and to sign mechanically documents of which she had no comprehension. All the legal documents, leases, contracts, powers of attorney, bonds and the like are accounted for upon this ground, that she did as directed by those in charge of her affairs, and others assumed that it was all right because no one interested raised any question in any particular matters. It was all in the family. She did nothing of her own initiative, originated nothing, always at suggestion or under direction of others, acquiescent.

MARIA HAD NO WILL OF HER OWN—NO VOLITIONAL POWER.

After Ignacia's death in Rome she was willing to go with the conspirators who plotted to abduct her, said she would not go with Cebrian; but after he had by his cleverness released her from their control, she flew to his arms, embraced him and went with him. She was thus the creature of her environments, no will of her own, no volitional power. Cebrian characterized Juanita and Celestine as the accomplices of José Cervera in his plot to carry her off and marry her to his brother Cesar. Maria was helpless in the circumstances and would have been their victim except for the coolness and strategy of Cebrian who circumvented their maneuvers. He was too skillful for the schemers and rescued Maria from their toils. That Mr. Cebrian was an accomplished strategist and a man of resources and fertile in expedients, and quite conscious of his gifts in these respects, is shown by his own account of his conduct in the affair of the attempted abduction; as, also, on another occasion in connection with the taking of the depositions of Mrs. Cebrian and himself in Europe in the Anselmo case in May, 1898, when he wrote from Paris to Miguel that he had finally sent to Lyons, the attorney, answers to the cross-questions

and in a separate envelope some explanations and observations regarding the same; he much desired to know how Miguel found their testimony for it was hard work, having no lawyer near to guide them. Within a week he said he would have another copy to send to Miguel or McEnerney, "The consul will send another copy to the attorney of Anselmo, who asked him for it. I employed a stratagem in order that the copy for the attorney for Anselmo might leave here a week later than that for Lyons. I think that I did this without the consul suspecting anything."

SHREWDNESS AND STRATEGY OF CEBRIAN.

In this he evinced his characteristic shrewdness in dealing with the difficulties that confronted him from time to time in connection with this vexatious litigation. In the preparation of Mrs. Cebrian's deposition and his own he was engaged for eleven days, morning, afternoon and sometimes evenings; and, having no stenographer, he "did a terrible amount of work in those eleven days; Mrs. Cebrian herself said that he 'worked divinely.'" After this it appears that the consul held him up for services in executing the commission in the sum of 2,500 francs or $500, at which Cebrian was astounded and feared the effect of this extortion upon his own lawyer, who might be deceived in regard to his fee, seeing the exorbitant charge of the consul for really clerical service. Although he was dumb with surprise and with the consequent anger for three weeks, first for the extortion or robbery by the consul; second, because he attributed it to a letter written by Anselmo's attorney to that official insinuating that as the amount at stake was large the consular fee might correspond; and, third, by the effect the charge would have on his own attorney, "for if this little work of the consul is worth $500, how much would that of our lawyers be worth?" But notwithstanding his indignation he mastered his emotions and concealed his chagrin.

CEBRIAN'S SELF-CONTROL, AS DESCRIBED BY HIMSELF, IN THE ROMAN INCIDENT.

Mr. Cebrian's ability to control himself is shown in his recital of the Roman incident after the death of Ignacia when

the Cerveras "not content with having killed Nacha and having robbed her in life and in death, they also sought to seize Maria." When Cervera was abusive Cebrian remained impassive, for although Cervera showered him with abuse, Celestine supporting him, Cebrian saw the snare that was laid and did not propose to allow himself to be taken by it, nor to abandon Maria; so he contented himself with curtly denying the imputations, making Cervera furious at his tranquility, and the two left the room where Cebrian was dining, and he had the will power to remain there eating everything brought and even repeating in order to extend the meal, thus dissembling his anxiety while mentally working out a plan whereby if he could not protect the body of Maria he would shield her soul, even if it was only for an hour; for if he had left at once the two accomplices of José Cervera, Celestine and Juanita, would immediately have worked upon the imagination of "our beloved Maria" to fix her in the idea of not going to Paris, so he remained in the room after the Cerveras had left that he might talk with Maria and he endeavored to frame words which would "recapacitate" or change her mind which had been infected first by José Cervera and secondly by Celestina, who had been working on her while Cebrian had been occupied with the interment and other important matters, and during the interval of this preoccupation they had utilized their opportunity of perfecting their plan to capture her and carry her off to marry Cesar and had succeeded in persuading her to not go back to Paris; but Cebrian undertook to efface the effect of their efforts and to convince her that they were uttering falsehoods; he had a hard time, however, as Celestina would not cease to plead for "Pepe" (that is, José Cervera), and was talking to Maria in the same strain as Cervera before the latter had left the room, and urging her that she should not go to Paris with Cebrian, who was in vain trying to counteract the influence of Celestina. After a long siege, two hours, Cebrian quit, unable to consummate his purpose and overcome the power that the Cerveras and their accomplice Celestina exerted over the mind of Maria.

A SCENE NEVER TO BE EFFACED FROM MEMORY.

The scene of that night would never be effaced from his memory. At 10 o'clock Cebrian withdrew from the apartment, leaving Maria with Celestina, and went to his hotel, where he spent a sleepless night thinking over the situation, so perilous to the peace and happiness and fortune of Maria. On the following morning he went to consult the American consul to find if that official could aid him to save Maria in preventing her from being captured and carried off by the Cerveras and to induce her to go to Paris with him. The American consul said it was impossible. Cebrian then sought the Spanish consul to advise with him about the matter, and that gentleman, who seemed to understand the situation in Rome and to have appreciated it prior to Cebrian's arrival, was glad to greet him and declared that he had heard of certain rumors before he had the pleasure of meeting him; the consul said that these rumors came from a lady who accompanied the señorita and who spoke Spanish as if she were a foreigner. When the consul consented to aid Cebrian, Cervera, who knew that the consul doubted him, having no remedy, submitted, because otherwise he would have increased the doubt of the consul upon whom depended the decision, so he yielded and asked pardon of Cebrian for what he said the night before, held out his hand and with all Cebrian's repugnance he took it, for he had no idea in his mind of vengeance or punishment; he only thought of the salvation of Maria; and she was saved, through the aid of the Spanish consul from the conspirators; and their conspiracy to carry her off and marry her to Cesar proved a failure, and she went to Paris with Cebrian.

CEBRIAN'S DOMINANT IDEA NOT TO LOSE MARIA.

At the time when he went to the Spanish consul to advise with him, Providence willed that Cebrian should there meet José Cervera, Cesar and their friend, and after the conversation narrated, having no notion of vengeance in his mind, so happy was he at the outcome, that he was, therefore silent; returning to his hotel, to his great joy, he found, "poor little Maria," who cast herself into his arms weeping,

kissed him and did not want to leave him, "unfortunate, for twelve hours she had seen herself isolated, although erroneously, and then she found the love of which she had never doubted." Cebrian's dominant idea was not to lose Maria, so he put up with an intolerable amount of effrontery from the conspirators; after the mass for the dead he even breakfasted and dined with them and endured with equanimity their irreverent behavior and coarse conduct rather than to give them an opportunity in which they could have carried him off as they might have done on the preceding night, if he had not contained himself; but he preserved his poise and thus kept them at bay; had it been otherwise and "if Maria could have been in a safe place" he would have showered them with abuse and would have left that sacrilegious place"; as it was, prudence dictated forbearance for the sake of Maria, and he parted with them, the company Laveaga for Paris and the company Cervera in the direction of Naples.

PRESERVED HIS POISE AND KEPT THE ENEMY AT BAY—A DESPERATE SITUATION—RESCUES MARIA AND TAKES HER TO HIS OWN HOME.

In all these circumstances Cebrian showed a mastery of mind; he acquitted himself creditably where a man less mentally endowed might have failed utterly. He found Maria, after the death of Ignacia, upon his arrival at Rome, in the power of persons whom he described as conspirators and spoliators, with accomplices who should have guarded her, but who participated in a plot to seize her and carry her off clandestinely to be married to an adventurer. Maria was there at the mercy of this coterie of complotters, utterly helpless, until Cebrian came and if it had not been for his advent she would have been captured and conveyed to Barcelona or elsewhere and married to Cesar. In their hands she was powerless. The servants seemed to have been suborned. The situation was, indeed, desperate, with these heartless rogues intent only upon the success of their own wicked purposes. Cebrian found himself in the presence of all these people with no one to advise or assist him and noth-

ing but his own superiority of intellect and resourceful mentality to enable Maria to escape from their clutches, and she was yielding to them and willing to go with them, whithersoever they willed, with a mind as plastic as that of a child, although she was then over thirty years of age, and was "a woman of dominant personality." On this supreme occasion when she was in peril of her liberty and when her fortune and future were at hazard from the harpies who had pounced upon her and were ready to capture her, how did this "dominant personality" assert itself? While she was with them she was submissive, docile and entirely subject to their wishes, had apparently no will of her own; she was as a child, simple and irresponsible, and the plotters were taking advantage of her condition until she was liberated through Cebrian's procurement of the Spanish consul's assistance, when she was as ready to go with him as she had been the night before to go with the Cerveras to her doom. Thenceforward until her decease she was a member of the Cebrian household; never leaving for even a day or a night the family circle; constantly in their company; if not under their surveillance, she was under their protection; they succeeded to the place and trust made vacant by the death of Ignacia.

CEBRIAN'S CHARACTER AND CAPACITY.

The head of that household naturally was Mr. Cebrian; no one questioned his authority, all bowed implicitly to his will; he was a devoted husband and father, and, while not a tyrant, it is quite clear that he maintained a judicious discipline and that all looked up to him for directions and were subject to his control. He was ever mindful of their interests, present and future, saw that they were properly educated and taught to depend upon their own exertions. His paramount idea was the conservation of the Cebrian family fortunes. A man of capacity and culture and worldly experience, apt at business, somewhat conversant with the law and its forms; he carried with him in his travels not only a copy of the Civil Code but also Cowdery's book of forms, a useful publication containing models of legal documents which he had received from Mr. Jarboe, the lawyer who had

drawn the will of Maria's mother, in the drafting of which he had participated; he wrote letters from Europe concerning the amendments to section 1387 of the Civil Code; he was thoroughly familiar with all the details of the Anselmo litigation; a vigilant observer from afar of all the proceedings, a close student of the arguments and briefs of counsel on both sides, a keen critic of his own lawyer's work and a shrewd analyst of the methods of their opponents; he has said of himself that he did not belong to "the literary clan" and was not a lawyer, but although not of the literary clan, as he called it, Cebrian was certainly a man of letters, as his correspondence shows, and although not a lawyer he was a student of the statutes of wills and successions.

ALTHOUGH NOT A LAWYER, VERSED IN THE STATUTES OF WILLS AND SUCCESSIONS.

He was very much vexed with the decision of the supreme court which nullified the commissioners' amendment on account of what he termed a clerical error in the code amendatory act, the bad news of "the scandalous fiasco" had not surprised him, because, unfortunately, he already knew that that grand country which, notwithstanding its riches, was still semi-civilized, and the laws, as well in California, as in the other states, had not yet come out of chaos. The action of the supreme court had disgusted him extremely, but he was still hopeful that the law might be amended so as to be more favorable to their case. This was in November, 1901. Mrs. Cebrian herself was anxious about that law; how did it stand; if it did not pass they would be as before, and the return to San Francisco would not be easy; they did not lose hope, however, that before spring perhaps it would be all arranged. Cebrian always advised with his wife and read to her what he sent to Miguel and the attorneys and she was in accord with him and they were prepared to do as directed. He was very anxious about the question of the codes and inquired if some step was not about to be taken, such as an extraordinary session of the legislature or something else, and he wanted to be informed about this by newspaper clippings or other means of knowledge. On this subject he was

extremely solicitous, for we find him inquiring in March, 1903, as to the question of the legislature about the new code, as to section 1387 of the Civil Code. He was thinking about asking by cable about this point, because the mail would take a month, and in April they were awaiting letters from Miguel as to what was the decision of the legislature. It may be regretted that the legislature had done nothing, for this left another question pending for some time. While he disclaimed being a lawyer, he yet perceived the faults of the law, as construed by the courts, and noted with discernment the conduct of the case by the attorneys; he was quick to see how Anselmo's lawyer had "given away" his design in a certain instance and his own attorney in his brief had also been guilty of a similar indiscretion exposing his hand to his adversary. He criticised leases and other documents concerning Maria's property and assumed the position of man of affairs in Europe as to her business; he acted practically as financier, received her money, indorsed checks, collected and deposited in his own bank account, as occasion required, and kept such accounts or memoranda as he pleased of these transactions; there was a direct relation of confidence between him and Maria from the death of Ignacia in 1888 to the end of Maria's life, covering the period of the date of the will of February, 1893.

ALIVE TO THE EXIGENCIES OF THE LEGAL SITUATION—HIS SUGGESTION OF AN AFFIDAVIT TO BE COPIED BY MARIA IN LIEU OF A DEPOSITION.

Although not a lawyer he was alive to the exigencies of the legal situation in the Anselmo case and very desirous that Maria should not be subjected to the ordeal of examination in court or before a commissioner, so he proposed that an affidavit be prepared, to be copied by her, to answer the purpose of a deposition. He was keen to the method of examination, for he wrote to Miguel from Cannes, April 12, 1898, that the manner of Anselmo's questions was less complicated than that of their own attorney (but of course he would not tell the latter so); to him, Cebrian, it would be all the same, but he would say it for Maria, for whom it

would be easier to answer short questions. "She has a cough and is troubled with her teeth, and very nervous, and I fear some difficulty with her answers, above all if cross-questions come from Anselmo. For this reason we to-day are cabling you 'If sister refuses to answer, will we lose our suit or not? She will make affidavit instead. Consult our attorneys.' It occurs to us if she makes an affidavit in her own handwriting that before December 24th she never heard mentioned of Anselmo under any of the names which they give him, nor yet of Basilia, all the interrogatories for her will be answered, and she will sign it before the consul and it would be carried to him to send it on, naturally giving as a pretext her want of health to endure so long an interrogatory. Let our attorney at the same time know that she was less than nine years old when she arrived in San Francisco; that she at once went to Benicia; and it is as clear as day that she cannot know the innumerable questions they put to her. But as there are so many technicalities in the law, I ask you this, or cable expecting that your answer after you have asked Lyons and McEnerney will arrive here before the 23d. If as a last step we see that she can answer, we will certainly take her, but if it seems dangerous to us and your answer approves the affidavit suggestion, we will do it that way." He cabled the same day to Miguel: "If sister refuses to testify, will we lose the suit or no, She will make affidavit instead. Consult lawyers."

A LOAD LIFTED FROM THE CEBRIANS WHEN MARIA ESCAPED EXAMINATION—SHE GOES TO ST. GERMAIN.

Mrs. Cebrian wrote April 15, 1898, to Miguel that she had received his telegram and a load was lifted from them in seeing that Maria would escape so horrible a torture as the protocol of questions "that soulless creature" sent them. "Maria is very nervous and oppressed with this matter, of which she had never heard mention, but now she will get over it quickly. The doctor will give us a certificate that she is suffering, and I think that everything will go well from this time on. The only thing is it will be long, as it will have to be written by hand." April 22, 1898, Mrs. Cebrian

notified Miguel that the doctor had already seen Maria and recommended her much tranquility and repose, therefore she went to St. Germain, on the outskirts of Paris, and he could go out any hour, if necessary. Maria was very well in St. Germain; the friends with whom she was staying were not aware of anything; they did not even know that the "testamentaria" of José Vincente continued; "they are very prudent and never ask anything, fortunately." Mrs. Cebrian had heard from Miguel that their attorney had been satisfied with the depositions of herself and Cebrian; they had been much exercised about this, and were relieved to know that the result was satisfactory, for she could assure him that they were "sudamos la gota gorta," which meant they had perspired profusely on account of their concern in the matter; Cebrian had labored divinely and the consul had complimented him greatly. "The escape of Maria was magnificent. The journey to St. Germain was a true inspiration"; and they had a debt of friendship with their friends who would not accept compensation, but they would see what presents could be made to them.

THE ESCAPE OF MARIA MAGNIFICENT—A TRUE INSPIRATION.

It appeared that it was "a true inspiration" that Maria should have gone to St. Germain, for she became much better. They were troubled about the commission to take their testimony, Cebrian had not ceased thinking about it for one moment. Maria would not be able to go to Cannes to testify, she did not care to do so, thus it was written to the consul; she would not testify, and a certificate came from the doctor who did not want her to pass through an interview so long and tiresome and she remained in St. Germain with "Mimi" who was a good sick nurse and the nervous illness was not dangerous. Maria wrote to the consul and sent him a certificate signed by the doctor that she could not come because of a nervous prostration.

MARIA'S LETTER TO THE CONSUL AT CANNES—INTRINSICALLY IMPROBABLE THAT SHE WAS ITS AUTHOR.

If we were to accept this letter as the genuine composition of Maria she should be considered a capable correspond-

ent, notwithstanding her physical condition; but it is intrinsically improbable that she was its author; indeed there can be no pretense that she composed the letter; it was written for her and copied by her and sent to the consul to support the doctor's certificate that she was unable to give her deposition. Cebrian had thought that an affidavit prepared for her would do in lieu of a deposition, but he was advised that if she had nervous prostration an affidavit would not be necessary, and that a doctor's certificate would suffice, which certificate was accordingly obtained and with it went the letter to the consul at Cannes, ostensibly composed by Maria. It is dated at St. Germain, 27th April, 1898:

"The Hon. P. J. Riddett,

"Vice Consul of the United States, Cannes.

"Sir: I have received your notification of the 23d inst.

"I am unable to be present at your office, as you request, on account of my bad health as you will see by the enclosed certificate of my physician. I wish to add that I declare under oath that before January 1895 (that is three years ago) I never knew nor I ever heard of any son or child of my late brother José Maria de Laveaga, nor I ever knew nor I ever heard of any person or persons, bearing the names of Anselmo José Maria de Laveaga, or J. M. Laveaga, or Joseph Laveaga or Joseph Dohrmann, or J. M. Dohrmann, or Joe Dohrmann, or William J. Dohrmann, or Anselmo Sanchez, or Anselmo José Sanchez or the boy Dohrmann, or the child of Basilia Sanchez, or Basilia Sanchez, or Basilia Sanchez or Basilia or Manzano, or any person or persons, bearing all those names or some of those names, or any combination of those names.

"And also I declare under oath that I do not know any person or persons bearing all the said names or some of said names, or any combination of said names.

"I wish you would send this letter with my Doctor's certificate to the Superior Court of San Francisco, Cal.

"I am sir, very respectfully yours,

"MARIA CONCEPCION de LAVEAGA."

It is a short but a highly artificial letter; could not easily have originated in the mind of a person unacquainted with the facts of the Anselmo controversy, concerning which Mr.

and Mrs. Cebrian repeatedly testified Maria knew nothing. Mr. Cebrian swore that he did not know by whom this statement had been prepared, that he had nothing to do with it, although it had been suggested by their lawyers that she should write a letter or affidavit or some sort of a paper saying, "I never heard of this Basilia." It had been testified that the names of Anselmo had never been mentioned in the house, yet in this letter she gives all of the different names attributed to him which could not have been done without acquaintance with the record.

CEBRIAN'S EXPLANATION OF THIS LETTER UNSATISFACTORY.

Mr. Cebrian in undertaking to explain this letter, denying that he had anything to do with its preparation, said that Maria had knowledge that Anselmo claimed part of the inheritance of her brother Vicente, although she was not familiar with the record in the case; but she became conversant with all the names by which the claimant was known because prior to April 12, 1898, they had talked over the question of remaining in Cannes and they had mentioned the different names, and it was a matter of jest in their house; Mrs. Cebrian's letter of April 15, 1898, merely meant that Maria was not familiar with the details of the matter; before Maria went to Europe and for two years while there she had heard all these names mentioned. This was his explanation of her knowledge of the names given in this letter which the court is asked to believe was composed by her; and yet it is in evidence from members of his own family that the name of Anselmo was never mentioned in the household. One of the children said she had a wonderful memory, and counsel for proponent comments on this extraordinary memory, strong and powerful, a splendid and retentive recollection, and he said that every witness bore testimony to the marvelous development of this faculty. Certainly this tribute is true, if she was the real author of this letter, and recalled without aid and prepared without assistance the component parts of this intricate epistle to the consul at Cannes. Mrs. Cebrian hoped that this would do and that there would be no other commissions to answer because these had her half dead.

THE ARTIFICE OF AN AFFIDAVIT TO AVERT INQUIRY—CEBRIAN TO PREPARE IT FOR MARIA TO COPY.

All through this we perceive the dread that Maria should be placed upon the stand to be interrogated in the ordinary mode, so the artifice of an affidavit prepared for and copied by her was suggested by Cebrian to avert the apprehended danger of a deposition. This suggestion was in his letter of April 12, 1898, to Miguel, and his explanation of it was that, as he did not know anything about law and had no lawyer to consult with, it occurred to him that it would be much shorter to write an affidavit, as he said in the letter; that was an idea that passed through his mind; so he contemplated preparing the affidavit for her and then have her copy it in her own handwriting and then send it on to San Francisco to be used instead of a deposition. The idea was that Cebrian would prepare an affidavit giving the substance of the questions, and one single statement would cover all the answers. The pretext for the affidavit would be her want of health to endure so long an interrogatory. If this could not be accomplished, the deposition would be taken as a last step, but if this should seem dangerous and the affidavit suggestion should be approved it would be done that way. In all these tribulations about the testimony of Maria, she appears never to have been consulted about anything; it was all to be done for her; the affidavit containing the substance of the questions and the answers formulated by Cebrian, copied by her, and sent to the court as her composition, coming from her head and hand, as it were, to be presented to a judicial tribunal as the emanation of her mind to influence its decision. The affidavit suggestion was not accepted, the deposition was not taken, and Maria escaped the ordeal of examination, which was their great object and the real occasion for their trip to Europe and their lengthened sojourn on the continent.

CEBRIAN ALWAYS ON THORNS—EXILED IN EUROPE.

It was not a journey of pleasure nor for educational purposes; if either of these elements entered into it was incidental and casual. All through his correspondence Cebrian

laments the necessity for their enforced absence from California; he was always on thorns, as he said; after the decision of the lower court in the Anselmo suit the supreme court would take its own time to decide and then the return of Maria could not be determined for a long period; the excessive prolongation of his stay in Europe kept him in continuous anxiety and took away the pleasure of everything; they suffered, but those who felt the consequence most were their children. When the matter was submitted in the trial court Mrs. Cebrian's desire to go to California was renewed, because they believed that she would not be bothered to go to the courts, but it would not be prudent that Maria should leave until they had the security of the supreme court; after the appeal she saw the impossibility of Maria returning until they had a favorable decision, which might not come for two years from that date, December, 1899. Mr. Cebrian would like to be in San Francisco, but his wife could not make up her mind to let him go. He was still kept away in September, 1900, when he wrote to Miguel that the wretched suit had disturbed his life completely, as well as that of his wife and had changed the course of their children, only God knew that it would not have gone worse had they remained in San Francisco; and he, who thought to be absent only a year, had now been more than four years with the prospect of an indefinite longer absence; he was destined to remain away years longer, for the case was proceeding at a turtle's pace, as Mrs. Cebrian said in November, 1902. In May, 1903, they were inclined to return to San Francisco because the children did not want to unamericanize themselves and they believed that America would suit them better than Europe. In August, 1903, Mr. Cebrian was impatient, anxious and regretful at not being in San Francisco. All his life in Europe had been a waste on account of this miserable case, and they longed to return except for the fear of the attorney of Anselmo and the court.

THE REASON FOR THE EXILE TO AVOID THE QUESTION AS TO MARIA'S INCOMPETENCY.

The reason for the trip to Europe was to avoid the question as to Maria's incompetency. So Cebrian testified. He

feared that if she came back to San Francisco the attorney for Anselmo would claim that she was incompetent and expose her to the ignominy of inquiry; this made the trip to and the stay in Europe indispensable; it had cost him more than anyone could imagine, not only in money but in suffering in body and soul; it was really providential that Anselmo's attorney had disclosed to his opponent the plans which he harbored to attack Maria on the score of her incompeteney; but this providential advantage was counterbalanced by what was inserted in the brief of the opposing attorney who had made a similar slip in revealing his own plans; but now it could not be remedied. Evidently, although Cebrian was not a lawyer, he thought he knew more than the two opposing attorneys.

CEBRIAN'S NATURAL SAGACITY.

His natural sagacity was shown by his suggestions to Miguel in a communication, January 25, 1897:

"With regard to Costa and the compromise; you, Pepa and I are exactly of the same opinion, and what is worse, I think that we are not mistaken. Costa has so little diplomacy that in the moment in which he speaks to D., or that D. speaks to him and he answers him, D. would think that he came with our instructions. It appears to be more probable that Le B. himself would be able to make D. foolish over this point rather than Costa. The person most suitable for this would be McEnerney. McEnerney would like for there to be a settlement, because he would save work and would collect more quickly, that it would be plausible to D. that McE. should interest himself in the matter. But to this I see two great difficulties.

"1st. If you should propose this to McE., the latter might believe that we were afraid; that we believed the case lost; and then he himself would lose faith in it and lose his ardor in the fight. This would not do. If on the contrary D. speaks to McE. in this strain, making it appear that it is contrary to our opinion, and that Le B. thinks it more expeditions and more practical, McE. himself might suspect the

game, and then we are as bad or worse off than if you spoke to him directly.

"2d difficulty. Supposing that McE. should take this step without our intervention, it is very possible that D. would think that McE. as a lawyer saw that the case was in bad shape; and then either D. would persist in the suit or he would make this demand excessive.

"In summing up accounts I see nothing but to wait until D. proposes a compromise, either through those that we know, or through some other person that we do not know, in which case it would be received with diplomacy. The fact that D. has not spoken of a compromise does not mean to say that he is not looking for it. Perhaps he is endeavoring to pump him, to feel his way with McE. in order to see how to open up the question. His delays can be explained in many ways, of course, but also it may be that he is using them simply for 'sparring,' in order to see if through pure weariness we may not cry out 'compromise' before he does."

DIPLOMATIC TACT AND TALENT.

In a subsequent letter to Miguel, dated Paris, February 14, 1897, he writes:

"With regard to the compromise the best time for Costa was in December, because it was then plausible that in view of his trip it should occur to him to mix in this matter without our authorization, but now, after having seen us here, by no means. Even though Costa were more diplomatic than he is, D. would always think that he was sent by us. It would be different if D. should speak first. Costa and I spoke of D. and of the compromise very little and very lightly; because I believe we have always said that it is well that one of us be favorable to the compromise and the other not. He asked me if I wanted him to speak to D. and I answered him what I have said above that, by no means would it be well at this time, and I added that if by chance, D. should speak to him; that he leave it in suspense; that he consult you and take it from you as if your words were mine, and that he answer you as he would answer me, that is to say, that I approve everything that you decide. I still think that D. desires and

trusts in a compromise, but that he does not know how to bring it to the point. Who knows?''

It has been claimed by counsel for proponent that there is no evidence that the attorney for Anselmo asserted the incompetency of Maria, but this is answered by Cebrian's admission that what Anselmo's attorney stated of Maria was one of the reasons for the trip to Europe, to take her out of California, ''thanks to his talking we came to Europe and delivered Maria from his claws.'' On the witness-stand Cebrian had said that he had not heard of the claim of her incompetency until he was in Europe; his recollection was that he did not hear of it until the year 1898; but when confronted by this letter he admitted that his attorney might have told him something about it before that time. The letter was dated January 12, 1897. So it seems that his recollection was at fault. His oral evidence was not in exact conformity with his written statement; and this illustrates, for an example, how this correspondence came into the record; it was not introduced until after he had denied the facts admitted therein; and this remark applies to all the testimony of this character, concerning which the counsel for proponent said that it was not conceivable that it was admissible, but, even if it were, it bore no such interpretation as contestant placed upon it. This might be a matter of argument if Cebrian's own construction had not precluded disputation, at least as to what he thought about it. In his testimony he said he was always opposed to a compromise in the Anselmo case, but in the letter above quoted, Paris, February 14, 1897, he shows his concern in the matter. Costa was intended as an intermediary but he lacked diplomacy so far that the attorney for Anselmo would easily see through him and perceive ''that he was sent by us.'' The game was to draw Anselmo's attorney out, for Cebrian thought that Dwyer desired and trusted in a compromise, but that he did not know how to bring it to the point, and Costa was equally inexpert. ''Who knows?''

MASTER OF THE ART OF DIPLOMACY.

It is quite plain that there was but one man in this whole business that was master of the art of diplomacy and who

understood how to impart instruction to the novices. He knew and he indicated in this letter the manner in which his knowledge should be applied to the solution of the problem. He was dexterous in design and deft in execution and the final settlement was, no doubt, the consummation of the conception of his brain, always active and ingenious. Mr. Cebrian kept daily notes of everything said or done in which he was interested. In a letter to Miguel from Paris, May 20, 1899, he denies having made a certain promise imputed to him, saying:

"Let us drop times and go to the subject. I don't remember ever having made the promise, I do not believe I made it; if I should have made it I would have told you and Pepa, and in addition I would have put it down in my diary, which I have just gone over from '94 to '96, and in it I have put down all of those painful details which I regret having read now."

CEBRIAN'S DIARIES AND THEIR DESTRUCTION BY HIM DURING HIS EXAMINATION.

Prior to the introduction of this letter in evidence Mr. Cebrian had testified that at times he had kept diaries after his marriage, but he could not remember at what times or for what years; he said he might have in his house some diaries; he was asked by counsel for contestant to investigate during noon recess and inform the court what years he kept diaries from 1890 to 1900; the request was made, but the court did not make any specific order; afterward he was asked if he had completed the search for the diaries; it was objected that the court had made no order that he make a search, it was simply a request of counsel to which the witness had assented; the request was that he should either bring his diaries into court or give the dates or the years in which he kept them; he said he could not remember 1890, 1891, 1892, 1893, 1894; he had previously testified that he thought he kept them in 1889 and 1894; he had found two diaries of those years, but he did not have them to produce in court because in the interval of intermission he had burned them in the range in his own house; they were

burned the very moment he saw them; he went into the kitchen and put them into the fire, because when he saw that a man could produce in court a stolen letter, he thought that the law might also allow such a man to read his diaries, "and my diaries are not your property." He burned other diaries, but he asserted that he could not remember the dates, whether they were of the years 1891 to 1895, but thought they were 1889 and 1894; he "burned quite a lot, a bunch," how many he could not tell. He burned them when he went home from the courtroom; he was under a misapprehension; he thought the court had ordered him to make the search; he did not know it was only the request of the counsel; he went to his house, and searched places where he knew he had several diaries, and took them to his kitchen, and before taking his luncheon, put them into the range; in his kitchen there was a big range, that could burn quite a lot, not a stove; he did not put them in the oven; they were consumed on the live coals; right into the coals he put them, cremating every diary he had in the house; he burned all that he had found. This act was accomplished at a noon recess of court after he had been requested to produce the diaries, his wife being the only person who knew what he had done; no one suggested to him to burn them; he did it of his own accord. He justified himself in this act because of the technical reason that the court had not ordered him to produce the diaries, it was only a request of counsel for contestant which he felt he was not bound to obey. The attorney for proponent had not advised him that he need not produce these documents, certainly not that he should destroy them; but he acted upon his own motion and so committed them to the flames and they became an irreducible minimum as evidence, if they should have been ever admissible.

EXPLANATION OF HIS DESTRUCTION OF THE DIARIES—TECHNICAL EXCUSE FOR HIS ACT.

These diaries might or might not have been admissible; that was a question for the court, after inspection; it was not a point to be decided by a witness or by a party in interest; it might have been a matter for contention of

counsel; it was possible evidence to be considered and resolved by the court, of vital value to the issue, and yet the witness took upon himself, after he was asked to produce these diaries, to destroy them upon the theory that he was not judicially ordered to produce them in court. The serious character of his act did not seem to impress the witness. He kept the court awaiting for several sessions the result of his search for those diaries and then came in on the last day and said that he had burned them all at the noon recess of the first day of investigation after he had been requested to look for them. The court was under the impression that it was agreed to by the parties that he should produce those diaries. Cebrian himself so thought, for he said in his explanation of his conduct, that he labored under a misapprehension when he left the courtroom that it was the court that had ordered him to bring them, not the counsel for contestant; and yet he destroyed the documents notwithstanding that he believed he was ordered by the court to produce them; and he came back to court, said nothing about the destruction, leaving it to be understood that he was still making search whereas he had at the noon of the first day, before taking his lunch, burned every diary he had in the house; "he burned the whole bunch the first morning," although at first he believed he was under order of court to produce, but when he realized it was only the counsel's request he did not feel bound to obey him; that was his explanation: "Of course that is the explanation; any intelligent man will see that this is the explanation."

WHY SHOULD HE DESTROY THOSE DIARIES? EVIDENCE WILLFULLY SUPPRESSED.

If the court had made an actual order in the premises the witness might have found himself in a serious situation and he seemed to realize this, for he sought shelter under the plea that there was no judicial command, but only a request of counsel to which he was not compelled to conform. The destruction of these diaries in the circumstances related is a matter of pregnant import; it is not to be ignored; if they contained nothing contradictory of Cebrian's oral statements,

nothing relevant to the subject matter, he could not be harmed by their production; if there were nothing to implicate him in connection with the issues involved, it would be to his advantage to keep his implied promise to produce them; but he chose to suppress and destroy them after he had led counsel and court to believe that he would expose them to judicial examination subject to proper protection as to privacy of matters not pertinent to the case; and he concealed, while a witness on the stand, the fact of this suppression and destruction for several days. It is denied, however, that these diaries have anything to do with the case, but the answer is that their existence was not admitted until when the witness had been examined about them and professed that he did not remember the dates of the years in which he had kept them, his constant answer as to particular years was "I don't remember" and "I don't know," and their connection with the matter is arguable from the correspondence referring to them and to their contents. Why should he destroy those diaries in such hot haste before taking his luncheon, in the interval of court recess, after the request to produce, if there was nothing inculpatory in them? It is certainly suggestive that they contained matter of moment prejudicial to proponent's case and there was that motive to prevent judicial inquiry. It is claimed, and with force, in connection with the destruction of these diaries at such a time and in such circumstances that they contained matter prejudicial to proponent and favorable to contestant; for, under the code, it is a satisfactory presumption that evidence willfully suppressed would be adverse if produced, and this evidence was willfully suppressed and destroyed by proponent, or by her husband who acted for her.

THE "MEMORIA"—EXISTENCE AND OBJECT ESTABLISHED.

In regard to the so-called "Memoria," Miguel testified that after the death of his father there was a meeting of the members of the family at which the will was read and also a paper, a "Memoria." Maria was present at the reading. Their mother had charge of this paper during her life and after that Ignacia held it and took it with her to Europe

and Miguel never saw it again. Mrs. Cebrian admitted in her examination that on this occasion there was some paper read besides the will and in that paper mention was made of Maria. "It was a private letter addressed to my mother from my father." Mrs. Cebrian was then asked and answered as follows:

"Q. That was what was called a Memoria? A. Well, I don't know if you would call it a Memoria. It was a private letter from father to my mother.

"Q. Did your father call it a Memoria? A. My father—no, I think not. My mother always called it a letter from my father to her. My father never spoke to me of the letter.

"Q. You heard the letter read? A. Yes, sir.

"Q. Was this Memoria referred to in the will? A. Not that I can remember. I remember of the letter very well.

"Q. Did not the will recite that some other matters had been left in the form of a Memoria, because your father did not desire to have them expressed in his will?"

To this question an objection was sustained upon the ground that the will was the best evidence.

"Q. Did you see the Memoria or letter? A. Yes, sir; my brother José Maria was reading; he read it for us, for all of us; he was crying it was all against him.

"Q. Do you know where that letter is now? A. No. I last saw it the day José Maria read it for us. So far as I know it was left with my mother. I never saw it afterwards. Maria was mentioned in the letter and myself and Miguel and all the children.

"Q. Was there anything in particular about Maria Concepcion?"

An objection was made and sustained to this question upon the ground that the letter was the best evidence.

"A. I do not recall that sometime afterward my mother took the letter out from among her papers and spoke of it to the children. Miguel never spoke to me about it; he had nothing to say after it was read; it was read before the whole family."

When the court ruled that inquiry as to the contents of the Memoria could not be made until its loss was established,

Mrs. Cebrian was not further questioned along that line; her illness intervening, she was never recalled; but Albert J. Le Breton, who had been attorney in the estate of the senior José Vicente de Laveaga, was called as a witness, the loss of the instrument having been proved, and he testified to its contents, and to the fact that it was read at a family council after the death of the elder Don José Vicente, Maria being present, and that by its terms Maria was committed to the care of her brother and sister. That there was such a paper as this "Memoria" is incontestable, and that it referred to Maria as its special object cannot be controverted in the face of the wills of the father and mother of Maria, and of the other evidence. It is unnecessary to revert to the clauses of those instruments, especially that of the mother in which she most fervently charged her executors with the care and protection of their younger sister, Maria Concepcion, "as long as she may live." At the date of that will, Maria was nearly 25 years of age. This was carrying out the spirit of the Memoria, or "letter," as Mrs. Cebrian chooses to call it, which she says was addressed to her mother. There is no other document to which that description applies and whatever became of it, it is undeniable that it once existed, and that it referred to Maria.

Mr. Cebrian testified that he heard about that Memoria, but he never saw it.

The last known of the Memoria it was in the possession of Ignacia, who took it to Europe, and when she died the record shows what became of her effects. The care of Maria's person devolved upon Ignacia and of her estate upon Miguel. Ignacia performed her part until her death, and Miguel continued his trust until Maria's decease, and is still in official function. No complaint is made that Ignacia was derelict in duty, nor is it charged that Miguel was unfaithful to his trust in the management of Maria's temporal affairs.

The testimony of Albert Le Breton is severely attacked by counsel for proponent and the court is asked to discredit his evidence because of his inaccuracies of recollection as to the details of a transaction thirty-six years old; but counsel says that so much stress is laid upon this incident that it

must be treated seriously, and assuming the "Memoria" as if it ever had been in existence, of what value is it evidentiarily? There is nothing in it of such import as to impute incompetency to Maria? Whatever may be the imperfections of memory, or other infirmities of this witness, there is support in his statement from other sources. Petronila Velasco testified that there was a Memoria left by Maria's father by which he had made special provision for her on account of her incompetency.

NO DOURT ABOUT THE EXISTENCE OF THE "MEMORIA" AND ITS APPLICATION TO MARIA.

There can be no doubt about the existence of this Memoria, whatever its weight as evidence. Miguel was asked about it on cross-examination as to a conversation he had had with Edward Cebrian and he referred to this Memoria and how the father had practically provided for the guardianship of Maria; then contestant, the door being opened, undertook to prove its contents, and in that way it came into the case. So with the will of the mother, Mrs. Cebrian was asked, "Do you know that your father or mother ever expressed any wish or purpose or desire that Maria should be particularly cared for by her brothers and sisters?" She said she had not. The question was then presented: "In your mother's will was not there some reference made to it?" To this query proponent's counsel objected that the will of the mother was the best evidence, whereupon an authenticated copy of the will was produced and admitted without objection. Mrs. Cebrian had denied that she knew that her father or mother had expressed any such wish or purpose concerning Maria, but, the will of her mother being produced, she admitted that it contained language to that effect. The record in this respect is as follows:

"Q. Was Maria put under your care and protection by anybody? A. No, of course—why should she? Her father, he had died, and she was of age.

"Q. Did anyone—did either of your parents request you to—or confer upon you the care and protection of Maria? A. No, sir, no.

"Q. In no form whatever? A. In no form of anything.

"Q. Now, then, I will ask you if any request was ever made of you by your father or mother for the protection of Maria? A. Must I answer?

"The Court: Yes. A. No.

"Q. None whatever? A. No, sir; none whatever; none of any kind.

"Q. And you are entirely certain that your mother never made any request of you alone for the care and protection of Maria? A. No. I am positive that there was no such request.

"Q. Did she ever make any such request of you together with the other children? A. No.

"Q. Or any of them? A. No.

"Q. You are very sure of that? A. I am very sure of that."

MRS. CEBRIAN CONTRADICTED BY THE WILL OF HER MOTHER.

At the end of this inquisition counsel for contestant offered the will in evidence upon the ground that he was taken by surprise because the instrument contained exactly such a request as the witness had disclaimed.

The will of the mother was upon that ground thereupon admitted. It contained the very request and charge upon her and her coexecutors, for the care and protection of their younger sister Maria as long as she might live, that Mrs. Cebrian was very sure had never been made of her or imposed upon her.

This is, of course, important in its suggestion that Maria was not competent to care for herself, otherwise why impose such an obligation?

Mrs. Cebrian was positive that there was no such request and could not be dislodged from her position until the instrument itself was produced with its terse and solemn charge upon her and her brothers and sister for the lifelong care and protection of their younger sister, Maria Concepcion.

THE BURDEN OF PROOF.

The counsel for proponent advert to the enormous record in this case, saying that it is not easy to analyze minutely

all this evidence; all that can be done is to focalize the main facts in proof. In the absence of testimony to the contrary the presumption favors the validity of the will; the beneficiaries of a will are as much entitled to protection as any other property owners, the due execution of the will being admitted. But a will does not prove itself. Even if there were no contest, certain essential facts must be established before it is admitted. Under our system these facts should be carefully inquired into on the original probate, and no one knows that better than counsel for proponent; the due execution of a will may not be admitted; it must be proved, contest or no contest. It is the every-day experience in this court to insist on exact ascertainment of the fundamental facts necessary to sanction the court's adjudication of the right to admission to probate in the first instance. Even in the progress of this trial, off and on for more than a year, delays have occurred owing to the care of the court to see that the proper evidence was adduced in many other matters of probating wills, where attorneys seemed to assume that it was a formal affair where no opposition was offered, and frequent friction has occurred through judicial insistence upon affirmative and precise evidence of the essentials of execution, soundness of mind, freedom from undue influence, absence of fraud, menace, misrepresentation or other constituents invalidating the instrument proffered for probate. In all cases of holographic wills the handwriting must be proved affirmatively by or on behalf of the proponent.

WHAT IS INCUMBENT UPON PROPONENT.

If there were no contest in the case at bar, it would be incumbent upon the proponent and, perhaps, her husband and others, to establish the authenticity of the handwriting of the decedent and the circumstances of the execution of the document to the extent of their knowledge; and it would be a careless court that would depart from the strictest scrutiny in this regard or indulge any assumptions or presumptions on account of the standing or reputation of the parties presenting the paper for judicial approval. It is true that, in a sense, the burden of proof rests upon the contestant;

that he must bear his own burden as to the issues set up by him; it is also true that it is not denied that the instrument is in the handwriting of decedent, that it is her own manuscript; and that, so far as the contest is concerned it is incumbent upon him to prove a negative, that she was not competent; that the will was not the voluntary emanation of her own mind, or that she was not free from circumstances of constraint; any one of these facts established justifies the contest; but this does not relieve the proponent ultimately from her burden of establishing all the elements necessary to entitle her to letters testamentary. She cannot escape this obligation nor evade its consequences, under our statutes. She must show, even if no person appear to contest the probate that the will was executed in all particulars as required by law and that the testatrix was of sound mind at the time of its execution and an holographic will must be proved in the same manner as other private writings. These are matters to be proved, concerning which testimony must be taken, "the court must hear testimony in proof of the will"; if holographic, it must be proved by one who saw the writing executed, or by evidence of the genuineness of the handwriting of the maker; or by a subscribing witness. Here there is no subscribing witness; but there are two persons, proponent and her husband, who testify that they were present when the decedent executed this instrument, and their evidence, irrespective of contest would seem to be indispensable to its probate as to the act itself and her mental competency to perform the act.

THE ADMISSIBILITY OF EVIDENCE AS TO THE WILLS, "MEMORIA," AND CORRESPONDENCE.

The testimony as to the wills of the parents of decedent, the "Memoria," and the correspondence of the Cebrians has been censured as improperly admitted. Counsel for proponent has contended with energetic eloquence that the evidence respecting the letters of Mr. and Mrs. Cebrian and "Nacha," and especially as to the so-called "Memoria" was not competent, has no legal place in the record; but even if it were conceivable that these were admissible, they have no such sig-

nificance as contestant seeks to give them, and they are not susceptible of the sinister interpretation sought to be ascribed to them, and that all of this testimony should be excluded from the consideration of the court, whose attention should be focused entirely on the evidence connected with the date of the will in 1893; that is to say, that the court must not concern itself with any act or fact except what occurred in or about the transaction of February 15, 1893, as to which there is no evidence except that of the proponent and her husband; they alone of living witnesses know what then transpired, no other mortal can contradict them on that score, and perforce the court is bound by their statements. If this be the law, the problem is easy of solution, because there is no direct evidence as to what happened there and then but that of the parties immediately interested, and if their word is in no wise to be doubted or contradicted, there is an end of controversy; but it is not the law, for in the same breath that it is asserted that there is no direct evidence to sustain the averment of contestant it is conceded that indirect and circumstantial evidence may be introduced to that end.

LIMITATIONS OF EVIDENCE.

Proponent says that we are to address ourselves solely to this act of February 15, 1893, and that only out of the mouths of the surviving persons then and there present, the beneficiaries of that act, can we elicit evidence as to the condition and competency at that moment of the decedent testatrix, and that all testimony such as the contestant offers tending to show that she was not mentally competent or that she was under constraint has no evidentiary value and that the documents introduced here have no evidentiary existence and must be discarded by the court in coming to its conclusion. As to the transaction itself it is axiomatic that the evidence must be indirect and circumstantial, for, as it is said in the books, very seldom does it happen that a direct act of influence is patent, and usually we must gather from the circumstances the existence of the influence.

CONSISTENCY OF ISSUES.

It seems to be suggested here that the issues of unsoundness and undue influence are not consistent; but while the issues are distinct as a rule, there may be a case where a person of immature intellect may be so influenced by one of superior power as to direct the manual performance of mechanical act. It has been held that while undue influence is entirely distinct from unsoundness, yet a person of unsound mind may be a victim of undue influence, and if it be shown in this case that decedent was incompetent the testament loses its force, assuming that she was circumvented by fraud.

SURROUNDINGS OF TESTATRIX.

It is not improper, therefore, to allude to the surround ings of decedent at the time of making the will and for the years prior and subsequent thereto.

At the time this document was drawn Maria was alone; no one about but Mr. and Mrs. Cebrian, and, they have testified, she produced it without their foreknowledge. Proponent's counsel claim that the fact as demonstrated by the record that no one but Maria had aught to do with the drafting of this will and no suggeston was made except by José Vicente that she should make her will and that he did not desire her to include him in its terms, as he was already well to do; so that it was out of her own head that she composed this testament and it is to her mind alone that we must attribute the act. As to what occurred at that time and place there is no human power invocable to tell us except the proponent and her husband, and the truth of their testimony must be tested by the entire record. José Vicente, to whom is ascribed advice as to the act, cannot contradict or corroborate what they have affirmed. Practically it all depends upon the word of Cebrian himself; his wife always agreeing with whatever he did or proposed to do; it does not appear that she ever disputed him. This will is dated in February, 1893, done in San Francisco, kept from the knowledge of Miguel, who having made inquiry as late as 1904, eleven years afterward, as to Maria's making a will, Mrs. Cebrian

concealed the fact from him, saying, "if you say anything to her about making a will, she will think she is going to die"; and yet at that time the paper was secreted in one of her trunks in the Cebrian house on Octavia street. There was certainly a lack of candor in this remark; and it was maintained throughout until it could no longer be withheld that such a paper existed and was in her possession.

CONCEALMENT OF FACTS FROM MIGUEL BY THE CEBRIANS.

Now in all this course of conduct of the Cebrians toward Miguel, in which it would seem, he being as she described him "a loving brother," he was entitled to information as to this fact, which was concealed from him; there was not only what lawyers call a *suggestio falsi,* but a *suppressio veri;* a suggestion that no will was in existence and a concealment from an heir that there was such an instrument which discriminated against him.

It would appear from this that they led Miguel to believe up to and long beyond the last moment of her life that Maria had attempted no testamentary disposition of her property and during all of this period they were in confidential communication and correspondence with him.

When Maria wrote her name to that paper nobody was about but Mrs. and Mrs. Cebrian; his wife had not remained during the whole of the reading, but had gone out and left him alone with Maria. If advice were necessary he was the only one to give it; there was no advice, no suggestion, according to his statement, except that he says that José Vicente talked with her and told her about making a will and that she did not wish to do it, because she did not wish any publicity or any witnesses and Vicente informed her that she did not need any witnesses; all she had to do was to make it in her own handwriting, all of it, and to look out that there was no writing on the paper besides her own; but he gave her no other form; that is the only intimation of any assistance given to her.

How are we to ascertain the facts of this transaction? There is no contemporaneous evidence except that of the beneficiaries. Are we bound to rely solely upon their state-

ments, or may we not inquire into circumstances confirmatory or contradictory? For all the years preceding her death and for seven weeks subsequent Miguel had not been advised that Maria had made a will, and then he wrote to Mrs. Cebrian that it was not the will of Maria; that it had been copied and made for her; that Maria was incompetent and hence he was entitled to one-half of the estate, and no reply was made, except that Mrs. Cebrian wrote that he might have one-half, and this was in connection with the protocol of the petition to the court prepared with her assistance by her husband for Miguel's approval. She did not in terms contradict the accusation of Miguel, but simply said that he might have his share under the law, which meant the law of succession in intestate estates.

DIFFICULTY IN DEALING WITH THE RECORD—ITS SALIENT FEATURES.

The difficulty in dealing with this record has been dwelt upon by counsel on both sides, but the court here tries to summarize as much of the evidence as is feasible, presenting the salient features.

Mrs. Lalla S. Highton first came to know Maria when the De Laveagas were living on Dupont street, near Pine, about 1869; the family had been here about a year before from Mexico; Mrs. Highton knew the whole family; she herself was about 14 years old then; Maria was about 7 or 8 years, wore short dresses, a little girl; Pepita, now Mrs. Cebrian, several years older; Mrs. Highton's parents, Mr. and Mrs. Scoofy, visited the De Laveagas freqeuntly, her father had known the elder De Laveaga in Mexico; the families interchanged calls; Mrs. Highton was especially intimate with Ignacia; closer to her than the younger ones; called her "Nacha"; always intimate with her, closer to each other as the years went by; she often visited their house and would be at table with them and would help Maria to speak English, she did not speak that language in those days; Mrs. Highton would talk Spanish with the young girls, but she would take books and teach Maria how to pronounce the words; she knew the family very well; visited them when

they moved to Stockton street, and after on Geary street. When Mrs. Highton was in Paris she visited Ignacia and Maria at their apartments several times during the two weeks in 1886 she spent in that city; conversed with Maria on those occasions; Maria told her she did not like San Francisco; preferred Paris; in her conversation with Maria she assumed the same attitude as she did with Ignacia or Mrs. Cebrian, but Maria had an individuality of her own; she had her own characteristics, but she was practically the same as other people to talk to or with; this was always the case during the period of their acquaintance; when she first knew her; when Maria tried to speak English she did not do very well, but she could always carry on a conversation in Spanish or say anything she liked, but in English she was slow, did not know it very well, not like an American; Maria was very affectionate toward Mrs. Highton, who had been a very close friend of the family, and her affection seemed to be really genuine; always called her by her first name and embraced her when she had not seen her for a long time, differing in this respect from conventional friends. Maria was naturally shy and reserved, but not so with her own people; if a stranger would come in she would have very little to say; she was modest, extremely shy, but when one came to know her very well, this shyness would gradually disappear and she would talk; if she would not like a visitor "she would shut up like a clam, have nothing to say," her mother was just the same, she was exactly like her mother, who was extremely shy and very reticent.

MRS. HIGHTON'S TESTIMONY.

Mrs. Highton was very fond of Spanish cooking and the De Laveagas invited her frequently to breakfast and dinner; she would talk to Maria at the table and sometimes help her with her English, help her to pronounce words, and Maria would ask Mrs. Highton all sorts of questions about English; she was not very well with it then and Mrs. Highton would go over and over it with her and aid her to get it right. Maria gave her a copy of Don Quixote, and it came about because Mrs. Highton had been reading it in English and criticising it and she remarked to Maria that she thought Don Quixote

was a lunatic, but Maria said that it was a wonderful book; that was the gist of her comment, not the literal language, and she said it lost so in translation, that if Mrs. Highton only read it in Spanish she would enjoy it more; so she gave her a copy in Spanish, "from Maria with love," something like that, Mrs. Highton could not remember exactly the inscription; this talk about Don Quixote was many years ago, Maria thought he was the ideal gentleman because he always aided people that were stricken and oppressed and, with all his madness, there was an underlying current, so to speak, in him that manifested the true gentleman, and that this was what the book intended to show. This was the interpretation Maria gave to the novel, that it was a sort of parody on those times, the days when knighthood was in flower and chivalry was carried to an extreme. Maria's thought was that Don Quixote in Spanish had a deeper meaning than fighting windmills; this was the substance of what she said in seeking to correct the criticism of Mrs. Highton, as she did not like her ideas derived from the English translation, so she gave her the original in Spanish to arrive at the true meaning of this creation of Cervantes, which she said was not conceived with the notion of writing the life of a lunatic, but with a better purpose, a different meaning; this was not word for word what Maria said, for it would be impossible after this lapse of time to repeat exactly her expressions in her endeavor to impart her idea of the motive of the book, but it was the purport.

MARIA COMPOSES A MENU—A MOST SATISFACTORY REPAST.

Mrs. Highton also testified that Maria composed a menu for a luncheon given by the former to some of her foreign guests at the Baldwin Hotel; it was cooked at the De Laveaga house by their cook and brought to the Baldwin. Mrs. Highton never had anything in all her life as fine as that lunch, and Maria did that all herself, and arranged everything; "it was just lovely," toothsome Spanish dishes, enchiladas, tortillas, frijoles and everything nice, done by the cook of the De Laveaga family, but under the inspiration of Maria, who took charge of the whole matter herself. Maria acted for

Mrs. Highton voluntarily; the latter called the next day upon her and wanted to pay whatever it cost, for "it must have cost quite a little bit," but Maria would not accept any money, and said, "I will never speak to you again if you ever suggest such a thing," this she said in Spanish; Maria told her when she called to speak about the matter that she would take charge of it herself and would make it with her cook in the house, so that there would be no trouble at all, and it was so done and sent over to the hotel by Mrs. Highton's messenger whom she sent with baskets to bring it and it was served to her guests, a most satisfactory repast, to their gustatory delight, as related.

TELLS MRS. HIGHTON ABOUT TRAVELS IN EUROPE; ALWAYS SPOKE SPANISH—ENGLISH NOT EASY TO MARIA.

Maria told Mrs. Highton about her European travels; she did not like San Francisco, she preferred Paris, she wanted to live over there all the time; they did not talk about politics, but gossiped somewhat about people they knew in common, mostly Spanish, Maria knew very few of Mrs. Highton's American friends, did not want to know them, she did not care for strangers; she talked about pictures, seemed to love them, loved music; she talked with Maria about paintings that were in the Cebrian house. Mrs. Highton called there one day and she was shown very beautiful pictures, a Titian, some Rubens, Velasquez and others, Maria told her they belonged to Mr. Cebrian, and that he had inherited them from his mother, and that he came from a splendid Spanish family and she seemed very pleased telling the history of these paintings and she often spoke of her grandfather's pictures; she said he was an admiral in the Spanish navy, he was her grandfather on the De Laveaga side; Mrs. Highton was fond of art, had studied painting all her life, and naturally was much interested in this subject, and had never seen such pictures in San Francisco, and very few museums of Europe had finer specimens of those artists. Maria was very much given to exercises of charity, and Mrs. Highton went with her and her sister, "more with Nacha than with her," to visit poor people and bestow alms; she was a very charitable

girl and very kindly to anyone in distress; it would appeal to her more than society.

SHY, RESERVED, RETICENT; BUT SOUND IN MIND.

Mrs. Highton was, among her other activities, a member of the Women's Exchange, and had a talk with Maria about that institution and wanted her to aid in erecting a building, but she declined and said she wanted what she had for other purposes; she said "Pepa" (Mrs. Cebrian) had so many children she thought she would give what she had to them. The Women's Exchange proposition did not appeal to her at all, it was too costly, would take too much money so she did not subscribe. The result of all of the observation and knowledge of Mrs. Highton was that Maria was of sound mind. Mrs. Highton's husband, the late Henry E. Highton, sometimes accompanied her on her visits to the family, but Maria did not converse much with him, was rather aloof, as she was usually with those she did not know as well as she did her own people.

THE REV. MR. COWLEY-CARROLL'S ACQUAINTANCE WITH MARIA.

The Rev. Hubert Cowley-Carroll, at present the rector of the Episcopal Church at Ross, Marin County, became acquainted with Maria early in 1905, at Mrs. Cebrian's house, 1801 Octavia street, San Francisco. He went there with Miss Claire Marshall, who is now his wife, to be introduced to the family, because the Cebrians and his affianced had been great friends for many years, and he was there for inspection, his fiancee took him there to introduce him to her friends, and among those present was Miss Maria de Laveaga; there were a great many others present, Mr. and Mrs. Cebrian, Edward, Josie, Louis, Harry and the two children, all of them in fact; he could not remember how many there were at the table at that time; it was at luncheon and took an hour or so more, he was there for more than three hours in all, they were all engaged in conversation; he talked with Maria, it would be difficult to recall the words but the sum and substance of it was that she congratulated him on his coming marriage, which was to take place in two or three months or more, and said how good a girl Claire was and

the usual pleasantries that would follow such an introduction; Miss Maria joined in the conversation which took place at the table, but he could not recall any particular thing that she said; all were talking; after the luncheon he took his leave and bade farewell to her and to everybody else. Subsequently he saw the family several times and had luncheon with them; he went always with Miss Marshall, met Maria, had a talk with her; he dined there on one occasion but he did not remember who was there at the dinner table; everybody was there that he knew, he should say that she certainly was there; in all, he had been there from a dozen to twenty times or more, until June, 1905, when he was married and went to Visalia; whenever he was in town he was welcome to go there. After his marriage upon his return from the country he visited the house accompanied by his wife and conversed with Maria; on the occasion of the July visit the only topic of conversation was about the wedding, at which she was in the church, but he could not recall what she said. He saw her after the earthquake and fire of April 18, 1906; he made two calls with his wife; Maria spoke upon that subject and about the incidents and experiences of that time.

Mr. Carroll said that on another occasion, when he was present at the house, there was a piano playing machine, a Cecilian or an Angelus, not a pianola, that was out of order and he undertook to repair it; Maria came to look at it and see the inside of it, she wanted to know what made it work and he undertook to show her its mechanism, and he explained to her how it worked; he was about an hour engaged in that operation and she was around practically all of the time. Mr. Carroll was familiar with the construction of musical instruments and had built an organ in his church in Ross. After he had about finished the repairing of the music machine Maria handed him a roll of perforated music and asked him if he could play it with the machinery exposed or words to that effect, which he said he could, and did, she watching the performance. On that occasion Mrs. Carroll accompanied him to the Cebrian home with their older boy, then two months of age; this was in July or August, 1906. Maria looked at the child and kissed him and said that the

baby was very bright for his age, the brightest baby of that age she had ever seen; he was not positive about that, however, but anyway the baby was exceptionally bright; he could not recall anything else in her actual words. His wife was there during the time that he and Maria exchanged words; the two ladies spoke with each other in much the same vein; after this they said good-by to each other and she requested that he should call again and play the music machine for her. He next saw her in the month of June, 1907, at the same residence; he was there a dozen times or more, meeting her there each time, occasionally having lunch. He was staying at this period for about three months in Alameda, at which place Maria called on him and his wife; she was accompanied by the two children, Isabella and Beatrice; after spending about a quarter or a half an hour in the house, where he lived, they went to his church, on his invitation, a short distance from where he lived; he opened the church and showed them around, and she remarked upon the beauty of a window over the altar, which attracted her attention; she asked him if he would play the organ for her, but he said he could not because he had no one present to blow the bellows; he offered to show her the keyboard of the organ as a rather inadequate substitute for his playing, but she said she would rather not go up in the chancel where it would be necessary to go to get to the organ; and that is all that took place in that church building. After showing them all over the building and its different apartments, including a room called the tower room, a very fine and large room where he told her he prepared his sermons and meditated in general, she remarked it would be a very beautiful place to read in; he did not remember in exact words, except what he had related about the organ and the window. In the company this time there were Miss Maria, Miss Josie and the two little children and his wife; they were together until the Carrolls took leave of them. In the several visits he made to the Cebrian house the average length of his stay would be about two hours. He conversed with Maria about a book of architecture which he had been looking over while there had been no one in the reception room before she came in. He

spoke to her of the subject of ecclesiastical architecture, to which he had devoted study, and which was sort of a hobby of his. He was looking over one of the books and she looked over his shoulder and as he passed the leaves over, she pointed to the things she admired; cathedrals, churches; she said there were a great many of these she had seen personally; she asked questions and he explained to her the characteristics of architecture at different periods; after laying aside the book they went in to lunch with the family, and during the meal engaged in conversation; after about two hours' stay, they bade adieu to each other. Subsequently to that occasion he did not see her so often, after going over to Ross, in 1908, at which time he saw her at the Cebrian house, and paid a visit of about two or three hours, and had conversation with her. his wife being with him but not the baby, and other people being in the room, Mrs. Cebrian among them; he recalled the subject matter of the conversation but not the exact words; she hoped that now that the Carrolls were to be near her, she would see them oftener, or words to that effect; on parting she went to the door and awaited until they were down the steps as she invariably did with the rest of the family; this was about the middle of March, 1908. Between this meeting and the time of the departure of Maria and her relatives to Europe, he made but one call upon the family; he was very busy in his new work, the parish, and called but once with his wife and remained for lunch and had conversation on the subject of the beauties of Ross Valley; it was a beautiful place; Maria commented on that, and said it was very nice that he was there, a very nice place, nice people; he agreed with her; she asked him if he had as large a church as the one she had seen in Alameda; he said no, but they hoped to build one. One thing that was spoken of by all and participated in by Maria, was the fact that soon they were to leave for Europe; he asked her where she would rather be, there or here, and she replied that she would prefer Paris to anywhere else and that she was very fond of that city, or words to that effect; he could not remember that she went into any details to explain why she was fond of that city; he never saw her again. From

all that he had seen of her, from her acts, talk, manner, demeanor, which he considered those of a rational person, he had formed the opinion that she was of sound mind; she was attentive to and interested in what was going on about her; independent, her conversation was pertinent, spontaneous and to the point, showing a knowledge of the subject with which they were dealing, and in all respects she acted like a normal person.

HIS CONVERSATIONS WITH MARIA IN ENGLISH—HE DID NOT SPEAK SPANISH.

Mr. Carroll did not speak Spanish, neither did his wife; Maria spoke another language, which he presumed to be Spanish but which he did not understand; all of his conversation with her, as well as that of his wife, was in English, which Maria spoke as fluently as he did and his wife did. On the first visit to the house he could not recall that he had any conversation with Maria during the luncheon; he was strange there and did not speak much to anybody on that occasion there at the table; afterward he spoke more freely. The order in which they were seated at the table was: Mrs. Cebrian was at the head, he was at her right, Mr. Cebrian next, on his right, Edward on the same side, then Maria and then Louis or probably Harry, and they came in that order each time invariably; she was three removed from him on the same side. The only conversation he could recall on his first visit was with Mrs. Cebrian, on the subject of his approaching marriage with Miss Marshall at that time, her remarks were congratulatory, but he could not recall their substance. Miss Josie sat opposite; all of the conversation that remained in his mind was their pleasure in meeting him and knowing that he was to marry Miss Marshall and how fond they were all of her, possibly some words were used by everybody in different forms, but that was the substance. Miss Marshall sat opposite him next to Josie; Mamie or Mrs. Caleya sat on the same side; Dr. Caleya perhaps sat with some of the boys; he did not recollect distinctly the order on the first occasion, but his recollection was crystallized by these subsequent visits in which they sat in identical order. When he

was looking at the book of architecture during one of his other visits he was awaiting the ladies to come down to lunch and Maria came in and looked at the pictures with him; she did not exhibit any shyness; she was not shy with him and he never noticed any particular shyness at any time in her conduct; she spoke as freely to him as she did to anyone else, after the first two times he visited them when she merely greeted him; she spoke English all the time, it would not have been any use if she had spoken anything else, as far as he was concerned; he could not recall distinctly particular conversations with other members of the family; usually they were together when the conversations occurred; when some of the subjects came up he did practically all of the talking because they were seeking information from him; on all of these occasions when he called there he aimed to be agreeable and entertaining; Maria was not talkative compared to himself, because he was rather gifted, if it be a gift indeed, nor compared to some others, and she certainly was not as talkative as he was, which he thought was to her advantage; she was not as voluble as some ladies whom he knew, nor was she on any account a silent person, habitually silent; she spoke freely whenever she desired to do so apparently.

MARIA A TALKATIVE PERSON—HAD COMMAND OF THE ENGLISH LANGUAGE—SPOKE FLUENTLY AND VOLUBLY.

In his opinion she was a talkative person. On the occasion of the visit to Alameda at the church Miss Josie came with her and the two children; Miss Josie spoke on that occasion on the shape of the church, the fact that it was in the shape of a cross, and he said that was customary to build their churches in the shape of a cross if the architectural conditions permitted. Mr. Carroll said that Maria spoke English fluently, as much so as Mrs. Cebrian, they both had command of the English language; Maria spoke equally as readily as Mrs. Cebrian. To Rev. Mr. Cowley-Carroll she spoke fluently and volubly in English, as he did not understand Spanish, English was the one medium of expression with him, but with Mrs. Highton, who spoke Spanish, Maria used that language

exclusively. English was not easy to Maria. She spoke it very slowly. Both these witnesses, however, agreed that she was with them communicative and companionable. Mr. Carroll said that at the time he sat at the table at luncheon at the Cebrian house, Mrs. Caleya (formerly Mamie Cebrian) and Dr. Caleya, her husband, sat there; he did not speak much to the doctor because the latter spoke little English and he conversed with him through Mrs. Caleya, who expatiated largely upon the mutual friendship subsisting between herself and his fiancee, who was a very dear friend of hers. During the taking of this testimony there was a short intermission of court proceedings, and when he resumed the stand he was asked if he had not spoken with anybody during the interval on this subject, he answered that he had done so and that it was called to his attention by Mr. Edward Cebrian that "Mamie," this is Mrs. Caleya, had not arrived for two months after that time and consequently Mr. Carroll realized that he had made that mistake.

SISTER MARY VINCENT'S RECOLLECTIONS OF MARIA.

Sister Mary Vincent, of the order of Saint Dominic, with which she had been connected for fifty years, coming to California in 1859, beginning at Benicia, where she was until she came down to San Francisco in 1863, and was teaching at Saint Rose's Academy for about ten years, on Brannan street, and after she was recalled to Benicia and remained there for about ten years, until in 1909 she returned to San Francisco, where she has been ever since at Saint Rose's. Sister Mary Vincent first met Maria early in 1867, at the Academy on Brannan street, where Maria was with her two sisters, Ignacia and Josephine, now Mrs. Cebrian, as day scholars. Maria was the youngest of the girls, she seemed to be about seven or eight years of age, Josephine was the second, she might have been twelve or fourteen; Ignacia was the oldest. Maria was in the primary class, Sister Mary Vincent had an intermediate class, but she had charge of the study hall and had the opportunity of seeing Maria daily and a number of times throughout the day; she might have been there some months and after that she went to Saint

Catherine's Academy at Benicia; Maria was not in Sister Mary Vincent's class, but she saw her often in the school; Sister Mary Vincent did not speak Spanish, and Maria spoke no other language at that time; the sister observed Maria talking to other children, for there were some other Spanish children there, and she talked to them; she did not see anything in Maria that was remarkable; after the few months spent at Benicia, Maria came back to Saint Rose's where she was for three or four years, where the sister was again teaching; and she saw her every day; by this time Maria could speak English, but the sister was never her teacher; she talked with her frequently. Sister Mary Vincent never visited her family when they lived at South Park, which was near the school, but she did call on the family on Stockton street and also on Geary street. When the sister was called to Benicia she would visit the city sometimes for a month or so at a time, and during that time she saw Maria, and and afterward as long as Maria was in San Francisco. In the St. Rose's school there were about three hundred pupils; the children all played together in one yard, Maria with the rest; when the school was over Maria went home with her sisters Ignacia and Josephine. Maria left the school about 1873; she was living on Stockton street at that time; it was about the year of her father's death; she had frequent talks with Maria, who told her about her travels and what she had seen, about friends and topics of the time, always greeted her in a very voluble manner, would embrace her frequently when she met or when she was taking her leave; Maria told her about the time when she was in Rome and the Pope and his Jubilee, described the ceremonies; said there was one she remembered, one very striking figure among the cardinals, and the sister asked who it was, and she said it was Cardinal Howard.

HER LAST CONVERSATION WITH MARIA—MARIA WAS NEVER ALONE—ALWAYS HAD A COMPANION.

Sister Mary Vicent remembered the very last conversation she had with Maria the day before the family left for Europe; Maria told her why they were taking the trip; it

was for Mr. Cebrian's health; the doctor told him to go to Vichy, in France, to take the baths and she said the doctor had ordered so many baths, and on that account they might have to remain a month at that place, and afterward they were to visit various places; she told the date they were to leave New York for Cherbourg, France, and the day they were due to arrive there, it was the 8th of September, 1908, and Sister Mary Vincent said wouldn't that be lovely, it was the Blessed Virgin's birthday, and Maria said "Yes, and that is my little niece's birthday, too." She had her two little nieces with her, she brought them to say good-by and she expressed great delight that she would have in meeting her niece, Mamie, Mrs. Caleya, a daughter of Mrs. Cebrian's who lived in Madrid. This conversation occurred in St. Rose's Academy, the day before they left for New York, and took about an hour; she had many other conversations with her at different times, and the result of all of them was that she believed her to be a rational person; in her opinion she was of sound mind. When Sister Mary Vincent went to the Cebrian house she always had a companion with her, and when Maria came to see her she always brought Mrs. Cebrian's little girls, her nieces, always someone came with her; Josie and Mamie and Maria came together and her conversation was with all of them; so when she went to the Cebrian house, the sister went to see the whole family, that is all the lady members of the family, Mrs. Cebrian included, and she talked with all of them on the same subject. Maria was never alone.

MISTAKEN AS TO MARIA'S AGE.

When Maria first came to school, early in 1867, she seemed to be about seven or eight years old; she was quite a little girl; the sister was accustomed to seeing a great many children and from observing Maria formed the opinion that she was about seven or eight years of age at that time. As a matter of fact Maria was eleven years old at that time, but Sister Mary Vincent judged her to be only seven or eight years of age, she thought that Josefa (Mrs. Cebrian) might be about thirteen or fourteen; five or six years older than

Maria, and Ignacia might have been sixteen or seventeen; that was the way the three looked to her.

AT SCHOOL MARIA COULD NOT SPEAK ENGLISH; SISTER MARY VINCENT SPOKE NO SPANISH.

There were several hundred children in the school; of course, she did not speak to each one of them every morning and afternoon, and did not wish to be so understood, but she spoke to them collectively; she never had Maria for a pupil, and Maria at that time could only speak Spanish, and the sister addressed the pupils in English. There was a little prayer said there at school in the morning and also in the afternoon; Our Father and Hail Mary, before the school would begin their lessons, and Maria would join in that prayer, it was said in English, she could not speak it very well, but did the best she could until she could speak English; that prayer was recited by the three hundred children present, the sister was where she could see them all, facing them, and kneeling down, but she did not look at any one in particular; of course, she did not see her when the family was in Europe, but when they were in San Francisco she saw her frequently, and when she called at their house Maria would embrace her, Josefa and Ignacia would do the same, Josie and everyone of them in the same manner; when Sister Mary Vincent spoke of calling to see Maria at the house, she was really calling there to see all the family that might be at home; it was a family call; she could not remember any particular conversation that she had with Josefa, now Mrs. Cebrian, but it was on general topics; she was very confidential with Ignacia who told the sister all her secrets; when Ignacia went to Europe they corresponded all the time, and Ignacia wrote her from Paris and she knew that the sister knew her secrets, and she wrote her confidentially; but Maria never wrote to her at all.

SISTER CLAIRE'S SCHOOL MEMORIES OF MARIA.

Sister Claire, also of the Order of St. Dominic, with which she has been connected for over thirty years, for the past two years in San Francisco at St. Rose's Academy on the corner

of Pine and Pierce streets, and before that in San Rafael for fourteen or fifteen years, and prior to that for a while in St. Rose's on Golden Gate avenue; she entered the Order in St. Catherine's Academy in Benicia, in 1870, and was there for about seven or eight years, thence transferred to the Academy on Golden Gate avenue, where she spent about sixteen years; she recalled meeting Maria first at Benicia, when she came there as a pupil in 1868, Sister Claire was also a pupil there at that time; Maria came with her sister, now Mrs. Cebrian; they were all boarders; Sister Claire was a more advanced scholar than Maria, who was in a much lower grade; her English was very imperfect and for that reason they did not have any very long conversations at that time; she saw Maria from day to day when they assembled for recreation in the evening, and at the play ground, and at the dinner table, and in the chapel; she did not remember in what part of the building Maria slept, but knew it was in the common dormitory with all of them, but the particular place she did not know.

DID NOT KNOW MARIA INTIMATELY AT SCHOOL—DID NOT SPEAK THE SAME LANGUAGE.

She did not come to know Maria very intimately, but they met as girls will at school; Maria was there about five months, she thought it was the first term of 1868; they never had any prolonged conversation for the reason of not speaking the same language, but they might have exchanged good-morning, or good-day, or say something. Sister Claire continued in school until she became a member of the Order and then remained as a teacher; met Miss Maria afterwards and continued acquaintance with her until the time of her death; there was an interruption of years at a time; called at her home to see her first on Geary street, but only once or twice; had conversation with her; they were just breaking up house, preparatory to going to Europe, and she told the visiting sisters the pleasure she anticipated from the trip; she could not remember the words it was so long ago, but that was the impression the sister received; she thought it was in 1881 or 1883, or around there, could not locate it

exactly; her manner was always cordial, pleased to see the sisters, would ask how they were, and on parting she was equally affectionate and hoped to see them again; Sister Claire thought this was in 1881, immediately before they left for Europe, it was along in the early eighties, 1882, it was, while Sister Claire was in St. Rose's Academy on Golden Gate avenue; afterwards that convent was burned down and they were temporarily on Fell and Fillmore streets, and there she again saw Maria, she thought it was in October, 1893; they were in the house that the sisters took on Scott street, where Sister Claire chanced to be on a visit.

SUBSEQUENT ACQUAINTANCE AND CONVERSATIONS—MARIA RETICENT AS A RULE.

Maria came to see Sister Mary Vincent and the conversation turned upon her trip to Europe, Sister Claire could not remember the exact words that were used by Maria, but she spoke about the Alhambra, mentioned the delicate effect of the lace, of the walls, of the fountains and their splashing of soft waters; she spoke of this old palace of the Moorish Kings and said there were a number of turrets or towers, and she spoke of the flowers that were in tropical splendor and said she loved flowers; she spoke of the architecture in general. As a rule, Maria's manner was reticent, but in describing the Alhambra, she was more or less animated; this visit lasted perhaps a half an hour. This talk about the Alhambra took place in the Cebrian home, at 1801 Octavia street, because there was something there that reminded her of it, there was a minature of the Alhambra in that house. Sister Claire forgot the little details of the conversation, but remembered the general impression; she called at the house on that day with Sister Mary Vincent and met there Mrs. Cebrian and Miss Maria. This conversation at the Cebrian home was after they had returned from their second trip to Europe; Sister Claire was somewhat confused about the date, first putting it 1906, then remembered it was prior to the date of the earthquake, about a year or two; she herself was staying in San Rafael, but came over from there and called at the convent; but the conversation that she had with Maria was

on Octavia street. In the latter days of 1903, Sister Claire saw Maria perhaps ten times, usually at her home, up to the time they left for Europe in August, 1908; the day before she went to Europe Maria came to the convent; she spoke to Sister Mary Vincent and said that the family were going to Europe because of the ill health of Mr. Cebrian who had been advised by his physician to visit some springs, or baths; she also mentioned the name of the steamer which had escaped her memory, Sister Mary Vincent had testified that it was the Crown Princess Cecilia; she bade farewell in the usual manner, embraced them tenderly and that was the last time they met.

SISTER CLAIRE'S CONVERSATION WITH EDWARD LE BRETON.

Sister Claire knew the late Edward J. Le Breton, and had a conversation with him after the commencement of this contest, at St. Rose's Academy, it was in the evening of Sunday, September 26th, 1909; she had known him for some time; he called to see her at that place in the parlor; in the course of that conversation he asked her if Maria acted like other children and if she played as other children did there at Benicia and Sister Claire told him that she did, and she told him that the little girl at that time did not speak English well, and on that account was not on speaking terms as the English-speaking girls were, one with another. Le Breton asked her as to whether Maria was of sound mind, and Sister Claire told him that she always found Maria rational and sensible in every respect, that she never heard her give expression to a thought that might not have emanated from a thinking brain, or was she ever the author of an action that was inconsistent with a well-balanced mind. Sister Claire asked Le Breton why he was figuring in this case, he said, "I am simply doing what my mother and my sister would wish me to do if they were living, I am helping my brother-in-law out who is receiving a great wrong, and injustice"; Sister Claire thought he said injustice; he also said, "I am only helping my brother-in-law, who has left all this matter to me."

SISTER CLAIRE'S REPLY TO THE QUERY, "WAS MARIA COMPETENT TO MAKE THIS WILL?"

Le Breton said that he did not believe that Maria had written that will, that she was not competent, and asked her if she thought that Maria did make it, to which Sister Claire responded: "Well, I said that fools rush in—cowards rush in where fools—dear me—fools rush in where angels fear to tread and that she showed her wit and wisdom—if she consulted any one else she showed her wit and wisdom in consulting some one who was a little more experienced than she was in dispensing of so large an amount of money." Le Breton asked her if she thought Maria was of sound mind when she was at school and she told him that she was sure that she was; she told him that Maria played as the other children, but because of her limited Spanish vocabulary, or English, the conversations were more in gestures than in language, and that after Maria left school, Sister Claire did not see her for a number of years until in 1881 at St. Rose's. Later in 1903 and 1904 and 1905 Sister Claire met her.

SPOKE BUT LITTLE WITH MARIA; SAW HER SELDOM, AND ONLY ONCE ALONE.

When Sister Claire conversed with Maria it was only a word or two because the sister's vocabulary was very limited in Spanish, but in her last conversation it was in English. Sister Claire did not speak French, and but little Spanish. When they were at school in 1868, Maria spoke very little English and Sister Claire very little Spanish, the study of which she did not pursue to any extent. From all Sister Claire observed of Maria she concluded that she was a rational person; the sister always spoke with Maria in English. Sister Claire had given much consideration to her answers about the reasons for her opinion and had thought the matter over and had spoken of it and had heard it spoken of; had met Mrs. Cebrian and had spoken to her about her interview with Le Breton and also to Mr. Cebrian and perhaps Josephine, and to the sisters of her community, to the Superior, and also to Sister Mary Vincent; she had taken considerable

interest in the matter, had met Mrs. Cebrian and talked about the case frequently, and about its different phases. When Le Breton came to see Sister Claire it was a remark of the sister's that led up to the object of his visit, he did not introduce it first; she remembered positively that she asked the question "Why are you figuring in this case?" She had the highest respect for Le Breton and regarded him as a gentleman of high character, but she did use that expression. Sister Claire first saw Maria at Benicia in 1867; she was there about five months; there were eighty or ninety other pupils there; she addressed her only occasionally in broken Spanish, "Como estamos Ud," or something like that, sometimes a word in English; Maria was not a pupil of hers; she did not see Maria again until 1881 or 1882 or 1883, she could not tell exactly when, just happened to meet her, she was not attending school, they had not been in touch during all these years; apart from what she had related the sister remembered no particular conversation that she had with Maria at any time during their acquainance; she had spoken of her sister Nacha's death at Rome, and told the details of that event, which was very, very sad; she may have told her in reference to her sister's last sickness, whether she was with her or not, but the witness did not hold that in her memory; whenever she saw Maria there was someone else present, either her sister or her little nieces, except once when Mrs. Cebrian was ill, Josephine was out, and she saw only Maria not the children; Sister Claire did not call very often at the house. The conversation with Le Breton took about three-quarters of an hour; the sister remembered the time by the church bells although she did not time it; she remembered the precise date of the interview because she inquired of another sister and she remembered; Sister Claire inquired some time ago, and she fixed that date in her mind because she thought it would save time; she inquired of the sisters if they remembered the evening that Le Breton called, simply because she wished to have it ready in case she should be asked; when she made the statement to Mrs. Cebrian about this conversation with Le Breton, she gave her the exact date when it took place and the hour; she was not keeping it for

Mrs. Cebrian, but it was simply for this court that she was keeping it.

SISTER CLAIRE IN ERROR AS TO MARIA'S AGE—OTHERS ALSO MISTAKEN ON THIS POINT.

Sister Claire thought that when Maria was at Benicia she was eight years old, the sister was sixteen herself at that time, eight years older than Maria. As a matter of fact, Maria was twelve years old at that time. Sister Claire at first thought that she was six years older than Maria but admitted that she made a mistake and that she was eight years older; Sister Claire repeated that she was sixteen years old when Maria was eight.

As to Maria's age, Sister Claire was in error, as was also Madame Narjot, a witness for proponent, who testified that she met Maria in 1874 and she said Maria was a little girl at that time perhaps twelve years of age, she was about the age of her own daughter Louisa, who was born in 1861, they were both very fond of sweets, to which the witness had treated them at a luncheon after they had been at church. In point of fact, Maria was then eighteen years old. Another witness, Mrs. de Peña, said that Maria was six years old when she first knew her, at the Ranch La Labor, in Mexico and last time Mrs. de Peña saw Maria was in 1879 and during that time she observed no change; she had grown physically, but otherwise she was always the same Maria, she noticed no change in her conduct, or manner, or the words which she used from the first time she saw her until the last time and then Maria was twenty-one years old.

SISTER CLAIRE'S OPINION AND REASONS AS TO SOUNDNESS OF MIND OF MARIA.

The reasons assigned by Sister Claire for her opinion as to the soundness of mind of decedent were: "She never uttered a word that it did not contain an idea and the idea had its corresponding reality"; "her conversations were not only reasonable but sensible," "all her acts were rational"; "an attentive listener"; "attention is a voluntary act of the mind and may be suspended at will"; "never saw her

do anything that a rational person would not do''; an idea is intangible and imponderable; she deduced judgments from other judgments and was impressed by what struck the outer senses; she never interrupted by foolish, frivolous, or irrelevant questions; her voice was low and gentle, her movement and manner deliberate; her natural tendency was to speak slowly, if excited or enthusiastic she would speak rapidly, the very expression of her face would show what she felt.

SISTER CLAIRE'S PREPARATION FOR EXAMINATION IN COURT.

Sister Claire's reasons for her judgment as to the mental condition of Maria were scholastically stated and the result of reflection for examination in court; provided the premises were perfect the conclusion was correct; she gave definitions of ''attention'' and ''idea,'' and applied them to her observations of Maria, and that she might be sure that she was right as to certain points, as to the duration of the time, for instance, occupied in the conversation with Le Breton, she made inquiry of another member of her community and she told her, and thus Sister Claire recalled the fact, that is to say, she depended on the recollection of some one else for the precise date of that interview; she remembered the time by the church bells, although she did not time it; it seems to have been made the subject of discussion in the community and the result was the fixing of the date in her mind; this was done so as to save time in case she should be interrogated; she wanted to be ready for examination in court; she was preparing for that ordeal by this process; she communicated the matter of the conversation to Mrs. Cebrian and the exact time and date of its occurrence; but this preparation was to preserve the matter for the court and not to gratify Mrs. Cebrian. Sister Claire contradicted Le Breton in essentials as to that conversation. He testified in November, 1909, and was asked particularly as to certain points of his interview with Sister Claire and the answers he made were gainsaid by her.

DEATH OF EDWARD LE BRETON—HIS TESTIMONY IMPEACHED AFTER HIS DEATH BY SISTER CLAIRE.

He died in May, 1910, suddenly while on a visit to the Home for the Aged, an institution which he had established,

conducted by a religious order, the Little Sisters of the Poor, under ecclesiastical jurisdiction. While his death was in a manner sudden, it was not unprovided, for he was fortified by the rites of the church of which he was a member. In the following month, June, 1910, Sister Claire took the stand and testified, impeaching his testimony in important particulars.

The counsel for proponent pronounced a panegyric upon the priests and the sisters who had testified to the soundness of mind of Maria, eulogized their sancity and sincerity; and seemed to consider that their conclusions as to her competency should be binding because of the exalted character of these witnesses and their vocations.

There need be no confusion here as to credibility of witnesses; there is no occasion for invidious comparisons; witnesses may be sincere and religious, pious and philanthropic, honest as the world goes; even scrupulous in the performance of their religious duties, and strict in the ordinary affairs of life, and yet mistaken in their impressions, erroneous in their judgments, and wrong in their deductions, according to their experience or limitations of observation.

HOW CONTRADICTIONS SHOULD BE CONSIDERED.

We must consider their opportunities, their intimacies, their relations to the parties, many other major or minor elements, before we accept as absolute their opinions upon a matter of such moment as the mentality of any person.

This applies to all who undertake to pass upon such a question, whether they be in religion or in the world, religious or secular, for there is a human side to all of them. It is an every-day event to examine judicially persons alleged to be of infirm intellect, and yet some are committed who are free from taint and others enlarged who should be restrained.

The Sisters are entitled to the encomium bestowed upon them; their character needs no eulogium; their works are universally manifest, although their part in them is not always recognized, their humility preventing any claim to worldly recognition; and yet, while on earth, even they may err in matters common to mortals not consecrated to religion.

We are asked to deny credit to Edward J. Le Breton and to reject his corporal oath because it is opposed to those who are in sacred orders, and who differ from him in recollection. Either may be in error, neither need be willfully wrong. Father Viladomat testified that he had a conversation with Edward Le Breton after the death of Maria, at Hayward, where the priest was pastor, and he made a memorandum of that conversation with Le Breton about a week before his own testimony, which was given September 23, 1910 (Le Breton had died in June, 1910), Father Viladomat had already seen the testimony of Le Breton and read it over several times; he received it by mail, it came from Mr. Cebrian; he made a statement in the office of the attorney for proponent, and he had talked with several persons about the case; he was at variance with Le Breton as to the recollection of the conversation with him at Hayward after the death of Maria.

FATHER VILADOMAT AT VARIANCE WITH LE BRETON.

Father Viladomat came to San Francisco in June, 1892, he was ordained December 8, 1892; was connected with the Spanish church as assistant pastor until May, 1901, now pastor of Hayward, Alameda County, for several years; knew Maria, saw her frequently, conversed with her, visited her at the Cebrian home, she visited him at Hayward; other members of the family were always with her; saw her at church; came to him to confession; not her regular confessor; while he lived in San Francisco a frequent visitor at the Cebrian home, spending as much as an hour and two hours there at a time; Maria and others came to see him before their last trip to Europe; never saw her again; in all that he saw of her acts and conversation she was rational and of sound mind. It appears that he had been sounded by both sides to this controversy and had made a statement to the proponent's attorney. Father Viladomat differed in many respects in recital of the conversation between himself and Le Breton, whom he had told that it was a shame that Miguel had made this contest, that he ought to know that his sister was sane; that the case had been talked over

among the Spanish people, the Spanish colony, and they all shared the same opinion that Maria was of sound mind; Le Breton asked him if he had known her and had met her often, to which Father Viladomat replied, "Yes, I met Miss de Laveaga many a time; and in fact she has been here in Hayward; she has taken lunch with me in Hayward, and I have seen her in Paris. I have seen her in San Francisco. I have seen her on many occasions, and my opinion is already in shape and form; that is, that I firmly believe that she was of a sound mind"; to this Le Breton said: "Don't you know that Maria left only $80,000 to Miguel? Don't you think that if she were of a sound mind she would have left a larger fortune to Miguel? If she were of sound mind she would have divided it among the two?" To which Father Viladomat replied that that would not prove that she was of unsound mind, that would simply prove to him that she had a mind of her own; then from that they went to another point and the priest put the points in a book that he had with him, so he would not make a mistake; the other point to which he referred in their conversation was about charity; Le Breton asked if he did not think that if Maria was of sound mind she would have left more for charity, to which the priest replied that he supposed Maria knew that Mrs. Cebrian would attend to that; and the conversation ended in this way: "But don't you, Father Viladomat, know that there are priests who differ in opinion from you about this matter?" He said, "Mr. Le Breton, I don't see how any priest, if he bases his testimony on the fact—I don't see how any priest could go and testify that Miss De Laveaga were insane." Then Le Breton told Father Viladomat that she had no business capacity; she did not know what she was doing, and the priest said: "Mr. Le Breton, you know that one thing is to have business capacity and another thing is to be incompetent; you know that there is a difference between the two."

DENIES STATEMENTS IMPUTED TO HIM BY LE BRETON.

Father Viladomat denied several statements imputed to him in the testimony of Mr. Le Breton; as to one statement

of Le Breton, however, to this effect: "I said that she did not have any idea, when she made that will, what property she was disposing of, she was giving away, and I think, Father Viladomat added 'perhaps they didn't tell her.'" Father Viladomat said that he could not take it for certain whether he said that or not, but the question was propounded to him, the words of his answer was that he could not remember for certain. Father Viladomat's memory was faulty sometimes, he was certainly mistaken in his statements as to certain times of meeting Maria, during part of that four years she was in Europe, and he here. At the time that he had this conversation with Le Breton, he had already talked to people about the case; with Father Antonio, Father Figols, Petronila Velasco, Mr. and Mrs. Cebrian, and with other members of the family in the Cebrian house, after the trial had started, he went in there on purpose for the case on more than one occasion, and on the second visit he met Edward Cebrian and this was before he had made the statement to counsel concerning his testimony; after the second visit he went to the office of the attorney to make the statements there of what he knew of Maria; with him went the eldest Cebrian and the son, Edward; he thought that these two visits were prior to the conversation he had had with Mr. Le Breton, that was the first statement he made; the second statement which was after the conversation with Mr. Le Breton was made about two or three weeks before the time of testifying, that date being September 23, 1910, and took place three or four weeks, perhaps, after that conversation.

PREPARES STATEMENTS OF TESTIMONY IN ADVANCE—COPIES AND CORRECTIONS.

Prior to making that statement he went to see Mrs. Cebrian and told her how Le Breton had called and what passed in the conversation; there were two copies made of the statement, by that he meant that there was a main statement referring to the conversation with Le Breton about the testimony given by the latter, and there was a copy there, sent with it, in regard to the statement which the attorney had sent to him after he went to see him, for corrections, for him

to correct; that was the main thing; Father Viladomat remembered that he sent another statement, and there were some things that he knew were not so, so he corrected them; so there were two statements.

The court is asked to accord absolute credence to one of these witnesses and to discredit another of the same class. The category is that of two witnesses similarly situated expressing opposite opinions on the same subject. Father Viladomat thought that any priest who said that Maria was not of sound mind was wrong; Le Breton had been asked if Father Viladomat, in the course of the conversation between them, speaking of and referring to Maria, had not used these words, "Whoever knew her and has a clear conscience believes as I do"; Le Breton denied that Father Viladomat used that language in substance or tenor; "he used no sentence or phrase containing that idea"; of this Le Breton was positive, the priest to the contrary notwithstanding.

OTHER PRIESTS DIFFER FROM FATHER VILADOMAT.

As has been shown in this record two other priests differed radically from Father Viladomat. One of them, Father Garriga, gave it as his opinion that Maria was not of sound mind and he gave his reasons, based upon a score of years of intimate personal and pastoral acquaintance with her and her family; but counsel for proponent said that Father Garriga's evidence had no value, that in it there was not a statement of a concrete fact indicative of unsoundness of mind and that all his evidence was consonant with the presumption of intellectual capacity and full intelligence; and yet this counsel's own client, Mrs. Cebrian, accredited Father Garriga as worthy of confidence, and advised Miguel in a letter dated April 29, 1898, to confer with him, for this Father was a great friend of the family, frequently breakfasted with them, she had great confidence in him, and if she were here she would not hesitate to consult him in regard to affairs.

FATHER GARRIGA VOUCHED FOR BY MRS. CEBRIAN—A GREAT FRIEND OF THE FAMILY.

After this tribute to his character, the court is asked to throw out the testimony of Father Garriga because of its un-

worth and remoteness, and because it contains no affirmation of fact coming within the observation of this priest, who for twenty-three years had been the pastor of the church which they attended and a particular friend of the family, a frequent visitor at their home, enjoying their hospitality, and the recipient of their confidence, one whom they would not hesitate to consult regarding their intimate internal affairs, and whom they commended to Miguel as entirely trustworthy in the matter of the Anselmo litigation.

There is no reason developable from the record why the confidence reposed in him in 1898 should be withdrawn in 1910. As to the facts upon which he based his conclusion as to her competency they were similar to those of other persons who testified upon the same point within the same period, and as to its remoteness it came close up to the date of the will, within two years; and from the time she was 12 years of age until she was 35 years old he saw no evidence of mental growth in her. Is it reasonable to suppose that in those two years she caught up with the preceding twenty odd years? If Father Garriga was creditable in 1898, why should he be discredited in 1910 by the same persons who then vouched for him?

FATHER VALENTINI'S FIRM CONVICTION AS TO MARIA'S MENTALITY: UNSOUND BY ALL MEANS

Father Valentini's evidence is treated by counsel for proponent as of no concern, although for a period of four years continuously from the time of his arrival, and while he was acting as pastor at St. Francis Church on Vallejo street, he was well acquainted with the De Laveaga family; he saw the family every Sunday, the ladies, Ignacia, Josefa, Maria and the others; visited their house occasionally and had luncheon there and dined several times; after he was transferred to Half Moon Bay in 1879 he came to town about twice a month, he called on them at their home about eight or ten times; before that he had been the spiritual adviser of Ignacia; he saw Maria about every time, she was always with Ignacia; he never saw Maria alone; he never saw her hold conversation with other people; he had a most decided opin-

ion as to whether she was of sound mind or not; she was not of sound mind; unsound by all means; he was firm in this conviction of her mentality. Proponent's counsel discounts the judgment of Father Valentini and undertakes to analyze the priest's reasons for his opinion, claiming that Maria's shyness, reticence and reserve merely prove her modesty and humility and respect doubtless for other persons present; and the counsel says that the priest's infirmities of memory are responsible for his mistakes of recollection and that in his testimony there was no irrational or unusual act shown in her conduct, and that the instances assigned as implying immaturity of intellect in Maria are insignificant, and that there is an absence of substantive acts to establish any such issue; besides it is all too remote, and is of no worth whatever.

Maria was 23 years old the last time Father Valentini saw her. At that age certainly Maria should have shown evidence of mental maturity. It is said that his reasons were inadequate and too remote and that he saw no active irrational act; but the condition here is a continuous one, and his testimony is a part of the chain showing its continuity.

EDWARD J. LE BRETON'S RELATION TO THE CASE.

Edward J. Le Breton was the brother-in-law of decedent; his sister had married Miguel; he was a bachelor; a native son of California, born in 1852, living all his life in the state, except for about three years when he was at school abroad. He became acquainted with Maria about the end of 1871 when his own family, consisting of his father, mother, older brother and sister, was living at 1117 Stockton street and the De Laveagas at 1115, next door, a double house; that acquaintance continued until she died; the two families became socially intimate and some years thereafter, in 1877, on the 23d of July, Miguel married Le Breton's sister; they interchanged visits; were on cordial terms, after their removal to Geary street, subsequent to the death of the senior De Laveaga, about 1875, their mutual acquaintance was even more intimate; in all of these visits he would meet Maria Concep-

cion, the youngest member of the family; met her at meals frequently, and in the parlor, and the members of the family visited his house; after the death of Maria's mother she continued to live on Geary street until they went to Europe in 1884; he saw her next after the family came back from Europe in 1888 after Ignacia's death; subsequently he saw her occasionally, she then lived with the Cebrians on Octavia street, he did not see her as frequently as before she went to Europe in 1884; they remained here until 1896, when they made another trip and they came back about 1902 or 1903; he did not see much of Maria after they came back from Europe; occasionally he visited the house on Octavia street; he remembered their going away again in 1908.

LE BRETON'S OPINION OF MARIA'S COMPETENCY AND HIS REASONS.

From all of his observation of and acquaintance with her from 1871 until 1908, Le Breton had formed an opinion as to whether she was of sound mind, and in his opinion she was not of sound mind; she certainly was deficient intellectually; it was one of those cases where the deficiency or unsoundness of intellect was indicated by an absence of those acts which a person of sound mind does; it was not manifested by acts of insanity but there was an undeveloped intellect; she never would join in the conversation, and if he addressed a sentence to her on any subject that he thought might interest her, it was met in an averted way, her face turned down, and she would answer yes or no, in a way that could not but impress itself upon him that she was absolutely deficient in intellect, and that manner of intercourse continued all the time; it seemed to be a sort of inaction of intellect. Le Breton explained to the court that what he meant by absolute deficiency of intellect was that he did not think that in all those years that he ever heard Maria give expression to a thought, or to issue a complete sentence when he was present. From his testimony it appeared that there was an inability to compose complicated sentences, and an incapacity to grasp and exploit an idea.

LE BRETON'S PERSONAL HISTORY AND OCCUPATIONS.

In the cross-examination Mr. Le Breton said that his then principal occupation was receiver of the California Safe Deposit and Trust Company, a position to which he had been appointed by the judge of this department; he had been executor and administrator of a great many estates; in a fiduciary capacity he had had a great deal to do with estates, but it had not been his principal business; he had not been educated for the bar, nor a student of law; he had been estranged from his brother-in-law for something over nine years until recently. Mr. Le Breton was three years in Europe at school from July, 1868, until May, 1871; he was with his parents, brother and sister in France and Germany and acquired a knowledge of the French and German languages and returned to San Francisco when he was about 18 years of age and went to work as a clerk in a stock-broker's office and subsequently as a bookkeeper and afterward in a banking-house; he was appointed administrator of a large estate, that of Theodore Leroy, June, 1882, and continued in that service until the end of the administration in 1892; he had other occupations, was intrusted with all the probate business of the French consulate for many years and other positions of trust; he had his own office, he had become independent, had bought a large interest in a bank and became its manager, the French Savings Bank, which he sold to a syndicate, and then he engaged in the management of his own capital; he withdrew from active employment because he wanted to devote a certain portion of his time to a particular purpose.

THE RECEIVER'S BOND ON WHICH MARIA WAS SURETY.

When he was appointed receiver of the California Trust Company he was required to give a million dollar bond. He did not ask Maria Concepcion de Laveaga to go on that bond; nor did he ask his nephew to go and intercede with her and solicit her to go on the bond for that sum; he did not personally present the bond to the court; but he caused it to be presented through his attorney, Joseph Vincent de Laveaga, his nephew, and the son of contestant, with his knowledge and approval; at that time Maria was of unsound mind, abso-

lutely deficient in intellect; the others on that bond were Herbert Fleischhacker for $500,000, Mortimer Fleischhacker for $500,000, Mrs. Cebrian for $500,000; he signed the bond as principal, but did not see it after he signed it, until the taking of the deposition in this case. He had been estranged from his brother-in-law, the contestant, for some years, but had entertained no unkindly feelings toward him; after this contest began they were reconciled.

LE BRETON'S CONVERSATION WITH SISTER CLAIRE—HIS INTEREST IN THE CONTEST.

Le Breton had taken an interest in the result of the contest, had visited some witnesses, among others Sister Claire, with whom he had had a conversation; he had known her a long time, and had learned that she had been a schoolmate of Maria at Benicia; he did not tell her in that conversation that he had charge of the contest; he did not tell her that he was only representing his brother-in-law who had left all the matter to him; he did not make such a statement. He told her that he was seeking information in a straightforward way, and that while what she had said was not what he expected he was thankful to her for having given it to him and for the time she had devoted to him; he did not say he "was glad to hear her say this because he knew she was telling the truth": she did not ask him why he was figuring in the case. It appears that Mr. Le Breton was quite industrious in seeking information from sisters and priests and from others in behalf of the brother-in-law with whom he had been recently reconciled, but the prospect did not pan out, and he had to be content with the result. His interviews at any rate were unsatisfactory to him; and none of those with whom he conversed quite agree with him as to what was said. They nearly all differ diametrically from him.

HOW MARIA CAME TO BE SURETY ON RECEIVER'S BOND—A FAMILY ARRANGEMENT.

In relation to the bond which Mr. Le Breton gave as receiver he identified the signatures of himself as principal and of "Maria C. de Laveaga" and others as sureties; he never

saw the bond after he signed it; he said he did not know her handwriting, but there was no question that it was her signature; he had nothing to do with the signing of the bond by Maria; had nothing to do with her; did not see her; he did not cause her to execute that instrument; he did not ask his attorney to see her; he was appointed receiver on January 14, 1908, and the bond was fixed at a million dollars; he informed his nephew, whom he had selected as attorney, that he could get two sureties for a million, but inasmuch as the attorney would profit by the receivership, and as he intended to take the attorney's brother into the office with him to train him in business, and furthermore, he was going to take Mr. Cebrian's son in and give him a position in the same office, Le Breton thought it was only just that Joseph Vincent should lay before his father, Miguel, the propriety of his father's serving as one of the bondsmen. In this snug little family arrangement, somewhat suggestive of nepotism, Le Breton thought his relative should furnish the balance of the bond, he having secured a promise from his friends of a part. Le Breton told his nephew that he had promises of getting the full bond from some other people who told him that they would go on as security, but he thought it was more proper that his brother-in-law and some member of his family, not having in mind Maria at all, should furnish the balance of the bond; the nephew thought so too and said he would talk to his father about it, and on the next day they had another interview upon the subject, when the nephew told him that he had laid the matter before his father, but because of the strained relations between him and Le Breton the father preferred not to go individually on the bond, but he would get his sisters to do so; so the next day the nephew reported to Le Breton that Mrs. Cebrian and Maria would each go on for $500,000, and thus complete the bond; when the nephew reported to him this reply of Miguel, he told Le Breton that his father had arranged for his two sisters to sign that bond and that he had given his guaranty to these sisters, that if they were subjected to any loss he would be responsible for it and that Miss Maria signed on the bond with the consent

of her brother and of her sister, Mrs. Cebrian; the nephew then took charge of the matter and completed the bond.

NEVER SPOKE TO MARIA ABOUT THE BOND.

After that bond was filed in the court he met Maria coming out of St. Dominic's Church one Sunday morning on the east side of Pierce street, between Bush and Pine; she was in company with one or two of the youngest daughters of Mrs. Cebrian, girls about 16 or 17, Isabel and Beatrice, he did not know that at that time they were 12 and 13 years of age respectively, they looked older, they were growing into womanhood; he had no conversation with Maria, coming out of church he waited for them, he said good morning to them, he spent about a minute with them, he had no recollection of saying anything except, "I hope you are well"; he lived within a block and a half of that place and went home for breakfast; he had no recollection of having mentioned the bond or having thanked her for having gone on that bond, nor having requested her to convey his compliments and thanks to her sister, Mrs. Cebrian; he walked along the street with Maria and the girls to the corner of Pine street and bowed them good morning, parted and went to his home and had his breakfast; this was about ten minutes to eight in the morning, but he did not remember the date, they had been to 7 o'clock mass; he had seen her at church occasionally at St. Dominic's, which was convenient to his own home and perhaps at other churches, but his memory was not clear about any specific occasion. He remembered when they went to Europe in 1908, that was after Maria had gone on his bond, he had never called at the Cebrian home after that incident; he remembered when the Cebrians returned from Europe, had made two visits to them about two months prior to the time at which he testified, which was November 17, 1909, after the contest had commenced.

NEVER SAW MARIA ALONE.

He had never dined or lunched in the Cebrian house during the lifetime of Maria, he sometimes called in the evening when some other guests were present; he had

never seen the library of Maria; he had never heard her speak French; he spoke English; he never addressed her in Spanish; he never understood that she spoke French; he never saw her alone, she was always in company with someone else; he had sent through some friend or messenger or relative his thanks to the ladies for going on his bond; he knew that the bond had to be presented to the court and to be approved by the judge; he went to the court and took the oath before the judge who had appointed him; he did not say anything to the judge in regard to the condition of mind of Maria; because in the opinion of his attorney and in his own judgment it was a good bond; Miguel was the business manager of the affairs of Maria; as he, himself, was a man of considerable means, and the judge no doubt knew that; the bond was approved, as he believed, because the court was satisfied of the financial responsibility of the principal and the court's confidence in its own appointee and general knowledge of the pecuniary circumstances of the sureties; it was all done in the best of faith, no injury to anybody could ensue, and it was a necessary legal step in the completion of the appointment of the receiver and that part of it he left to the decision of his attorney; she had never been legally declared incompetent; she had in her own name a great deal of property; it was done upon the advice of her brother and business manager and in the best of faith, while he believed that she was of feeble mind, she was a living human being, although easily influenced for good or for evil, yet it did not follow that the act was wrong since it was done in perfect good faith by the direction of somebody who knew her and who was the manager of her property, and her sister, Mrs. Cebrian, was present and knew of the act and acquiesced; he thought it was better that it should remain in the members of the family and he felt at liberty to call upon the De Laveaga branch, since several members of that family were beneficiaries of the receivership, and of the hard labors that he expected to perform.

DISCLAIMS ANY MATERIAL INTEREST IN LITIGATION.

Mr. Le Breton said he had no direct or material interest of any kind in this litigation; he expected no pecuniary

advantage from it in any way. Edward J. Le Breton disclaimed any material interest in the result of this litigation, but he had busied himself out of consideration for the family; he had been accused of intermeddling in their affairs, and had been threatened with legal proceedings for his officious actions and conduct; but his only concern was to observe the character of the family; in this as in the Anselmo litigation his thought was about the family reputation. In the Anselmo litigation his assistance was enlisted by Miguel, with whom he had previously consulted about the business interests of Maria and the management of her property and it was he who had selected the attorney of record in that case for the respondents, and there was no end of consultations between himself, that attorney, and Miguel about the necessity of keeping Maria in Europe; at the time that Mr. and Mrs. Cebrian and the family and Maria went to Europe it was absolutely understood among them all that it was to escape testifying and appearing in the Anselmo contest; every possible means was discussed to avoid the taking of Maria's testimony as it would disclose her incompetency.

MARIA ABSOLUTELY INCOMPETENT TO MAKE A WILL.

It was talked over as a fact that Maria was absolutely incompetent to make a will, and, therefore, she would die intestate, and so the same people would repeat their raid upon the estate, and it was essential in some manner to bar that contingency; finally, when the settlement was made, care was taken to insert a clause forfeiting any claim upon Maria's estate, and all this was done upon the assumption that she was utterly incapable of making a will. She was not consulted at all in the premises. The subject of these consultations was the danger of Maria's mental incompetency becoming known, by reason of the fact that attempts were being made to have her deposition taken and the question of a compromise came up very often, Miguel being desirous of ending the litigation and avoiding the notoriety and bother of the business. Mr. Le Breton had endeavored in like manner to compose the controversy in the case at bar. He had been friendly with the Cebrians; after the fire of April, 1906,

he had afforded them and Maria shelter at the house of the Little Sisters of the Poor (an establishment of his own endowment), immediately after the earthquake, when the entire family, including Maria, came there with their appurtenances and they were temporarily accommodated.

FUTILE ENDEAVORS TO ADJUST MATTERS.

Mr. Le Breton's endeavors to adjust the matters in this case were futile, although it appears that he had availed himself of the intervention of one Daniel Meyer, a conspicuous local capitalist, and friend of all concerned, who very much desired to see all the parties reconciled; Meyer called on Cebrian on Octavia street in July, 1909, and suggested a reconciliation, purely as a business proposition, but, although Cebrian had previously called on him, not to consult with him, but simply as a social call, to convince himself of Meyer's feelings in the matter, after Meyer had called Cebrian's son Louis in the street to let him know his opinion in the matter. Cebrian did not relish the intrusion of outsiders; besides Le Breton ought to have borne in mind that Miguel should have taken the first step toward reconciliation, that he was the aggressor, that Mrs. Cebrian had tendered him four times her sisterly love, which was brutally rejected, and compelled her to secure the services of an attorney and then later, by his unnatural aggression, the aid of another, against her own will. To these remarks in writing made by Mr. Cebrian, Mr. Le Breton made response recounting the circumstances which brought about Mr. Meyer's interference in the case, Le Breton wrote to Cebrian acknowledging the receipt of the communication of July 28, 1909, saying:

LE BRETON WRITES TO CEBRIAN.

"Early last week Mr. Daniel Meyer called at my office, while I was absent. Later in the week I accidentally met him on the cars and he told me the object of his visit to my office was to try and effect some compromise between Miguel and his sister. This is the first and only time I have ever spoken to Mr. Meyer about the present trouble. Mr. Meyer explained that being an old friend of the different branches

to this controversy he would be pleased, purely out of motives of kindness, to render his assistance toward a compromise and thus avoid publicity, scandal and embittered relations.

"I reported this message to Vin and his father upon their return from the country on Monday.

"Miguel and Vin saw Mr. Meyer personally, and Mr. Meyer's visit to your house was sanctioned by Miguel.

"It was a spontaneous effort by Daniel Meyer, an old and well meaning man, to do a kindly act. All honor to him for his worthy motives. I think Miguel's parents, your parents and my own parents would be thankful to him. For of course any scandal would scatter on the Cebrian and Le Breton families, as well as on the De Laveagas, if there is to be a bitter contest.

"I am not acting without authority in these matters, and I am quite willing to have a further conference with you, either at your house or at the offices of your attorneys, looking toward a settlement of the business end of this important affair. No harm can come of it. We cannot hope for a reconciliation at this time. I trust this may follow later, if we all act in the right spirit.

"It is beyond accomplishment that Miguel should go to you or your attorneys as a supplicant for compromise. We must deal with the elements we have as they are and not as we would like to have them.

"I trust you will accept this letter in the spirit of good will which prompts it."

CEBRIAN REPLIES.

Next day, July 30th, the reply to this forthcame from Cebrian:

"Your letter of the 29th inst. asking for a conference about the present controversy was received this morning and we are glad for it. I have tried, in vain so far, to see Mrs. Cebrian's lawyers, so as to make an appointment. As soon as I see them I will notify you. I hope it will be for to-morrow, Saturday.

"In regard to Mr. Daniel Meyer, I see your opinion coincides with ours; I wrote him that same day expressing our

earnest thanks for his good intentions; because I believe they (our parents) do thank him, because they do see his disinterested motives, as well as they see our motives (yours, Miguel's and mine).

We thank Mr. Meyer for his efforts in avoiding scandal, which unfortunately has already been started. But this has only proved the truth of what I told you on the 14th and 15th June last, when you called in the evening at our house, to wit: 'that all Cebrians' friends would think of the Cebrians as well, and as much, after the scandal, as they used to think of them last year' and in fact, if you could see, or know, all the messages of love, of sympathy, of offers and attachment, we have received by phone, by letter and in person, since the newspapers began to insinuate scandal you would be amazed. The scandal, if continued, will not besmirch the Cebrians, but the scandal-promoters themselves. The Cebrians' good name is founded on solid ground, not on humbug, nor on false pretenses.

"Sometimes scandal appears, for some little time, as TRUTH . . . just as there occurs miscarriage of justice in every land; and scandal bites fiercely when there are shady financial transactions; and scandal like cases of heredity (now so much in vogue); of heredity for instance when uncles on the paternal and the maternal sides are deficient, each one in its own way, and coupled with a physically defective parentage; scandal prefers people in prominent social positions; scandal bites and gnaws always . . . but in the end TRUTH prevails.

"Coming to the last paragraph of your letter, I appreciate your statement that 'we must deal with the elements we have as they are, and not as we would like to have them.'

"I suppose you fully realize that Mr. Miguel, as well as we all, cannot avoid the law of Nature.

We accept your letter in the spirit of good will you sent it; animated of the same good spirit, I answer it, trusting that some good will come out of it."

LE BRETON'S ACTIVITY TO AVERT SCANDAL AND NOTORIETY.

Mr. Le Breton insisted that all the activity he had shown in this case was to avert scandal and notoriety and that he

had no material interest directly or indirectly in the controversy; so far as he was concerned all idea of interest was eliminated; all his endeavors had been to promote peace, to preserve tranquility, and to establish just relations between the members of the family; he was in no wise to be materially benefited by the outcome; but he was conscientiously convinced that Maria was not competent to make a will, that the instrument could not have originated in her mind, that a great injustice had been done to his brother-in-law, and that he himself was justified in seeking to prevent the wrong being consummated, by whomsoever it was premeditated, or whosoever was its actual author. He repeated that he personally had no interest in the result; his fortune was not to be augmented nor diminished and his own circumstances could not be affected one way or another, whatever the event of the litigation, and he had no animus either way; he had no bias or prejudice, not in the least, nor was he affected by the fact that Mrs. Cebrian had withdrawn from his bond as receiver, nor by the character of the correspondence from her and her attorney in connection with this case; he had received a letter from her in which she announced her withdrawal from the bond, because he had acted aggressively and treacherously towards her. This was followed by a long letter from her attorney, sent by registered mail, criticising the activity of Le Breton in this controversy and imputing to him impertinent interference. Nevertheless Le Breton harbored no resentment and testified to the truth according to his conscience.

MRS. BASMAISON, NURSE IN THE CEBRIAN FAMILY, TESTIFIES.

Mrs. Emilie Basmaison, a native of Alsace-Lorraine, born in Phalsbourg, in 1872, whose native tongue was German, although French seemed also to be vernacular, became acquainted with the decedent through the medium of an advertisement in a newspaper, the "Figaro," in Paris, in June, 1897, when the witness was seeking employment as a nurse; she was then about twenty years old; in response to the advertisement she obtained a situation in the Cebrian family in the Avenue Marceau; the family consisted of Mr. and

Mrs. Cebrian, their children, Mamie, Josie, Edward, Louis, Harry, Rafael, Isabel and baby Beatrice, then eight months old; Maria was included in the family; Mrs. Cebrian employed the witness as a nurse for the little baby Beatrice, and she continued in that capacity for three years and a half; she quit the service at the time of the French Exposition in 1900, in the latter part of August, to get married, her general duties were to nurse the baby and to do a little sewing and sometimes accompany the little boys to school; while her native language was German she had learned French and spoke that only in the family. Maria spoke only French to her. She traveled with the family to various places. She used to dress Maria's hair every day and sometimes do a little sewing for her and conversed with her frequently in French; when they went traveling she went along with Maria sight-seeing and talked with her, the others of the family were present, and the servants were with them; the witness was minding the baby Beatrice; when they went out to visit stores or take the air the other children and the other servant, Diega, were always with them.

MARIA SPOKE WITH THE NURSE ALWAYS IN FRENCH—SPOKE AS READILY IN ONE LANGUAGE AS ANOTHER—TALKATIVE.

Maria spoke French always with her at that time; the witness subsequently learned something of Spanish, Maria helping her; the language used in the house was generally Spanish, but sometimes it was English or French; after the witness was married she came to America, finally to San Francisco, which she reached about February, 1901; she knew Mrs. Cebrian was here because they were in constant correspondence; it was in 1904 when the Cebrian family came again from Europe that she next met Maria at their house on Octavia street; met her frequently thereafter; at the time of the earthquake and thereafter; the witness was employed to do washing for the family and left clothes in Maria's room and talked with her, always in French; Maria said that she was glad the witness came in the house and spoke French with her as she was afraid she was going to forget as she had no opportunity to speak French; Maria gave her many presents, supplied her for a long time with necessary gar-

ments, gave toys to her children, she was very fond of children, she gave to her "novenas" and other booklets; she remembered the family going to Europe in 1908; Maria gave her a souvenir, a satchel, on that occasion, the last time she saw her. In her opinion Maria was always of sound mind; she was like anybody else, never saw anything particular about her conduct; never knew or heard that she had nervous prostration, she had stomach trouble, she had heard; as to Maria's French she could not say that she spoke correctly or grammatically, but she spoke the most necessary words; Maria was a talkative person; she spoke as readily in one language as in another, so it seemed to her; the members of the family generally spoke in Spanish; but sometimes in English and sometimes in French; they all understood and spoke French; she never was in a store alone with Maria, always someone else with her, Mamie or Josie, the nieces, or Diega, the servant, who spoke only Spanish; after a while the witness herself learned to speak Spanish, but not with facility, just the most necessary Spanish. This witness testified that Maria spoke as readily in one language as another, and it was argued thence that she was a linguist.

One of the counsel adverts to the fact that Maria's knowledge of French acquired after she went to Europe when she was twenty-seven years old at that time and lived there for three or four years during which period she must have learned and spoken that language, an acquisition at her age impossible to a person of immature or defective intellect, is of prime importance in proof of her mental capacity; the Basmaisons testified that she spoke French to them, and Josephine Cebrian's evidence is confirmed in this respect by them; this demonstrates that Maria possessed unusual mental power and mental application; she could speak three languages. Edward Cebrian said she spoke French, English and Spanish; he conversed with her in all of them, and heard her speak a few words in Portuguese, and heard her read Latin and sing in Latin.

MARIA'S KNOWLEDGE OF LANGUAGES AND LITERATURE.

The other counsel for proponent alluded to her knowledge of general literature and languages, and seemed to think it

remarkable that she could and did recite the "Pater Noster" in Latin. It would appear, therefore, that she was to some extent versed in five languages. If we are to accept this as a conclusion of her mentality, the facility for acquiring colloquial familiarity with languages, she is shown to have had some power of mind; but this, in itself, is not proof of intellectual power, because, as was once said by one person of another who prided himself on his linguistic attainments, he spoke in seven languages and thought in none. The deduction is too broad, even if borne out by the proof. It is said that industry and capacity were requisite to accomplish this result. In the opinion of counsel it was a remarkable achievement to acquire her knowledge of French at such an age; but she had been several years in France, and it would have been more remarkable if she had not learned sufficient to talk to the maid who dressed her hair, and who said "she spoke the most necessary words." It does not appear authentically that she was proficient in the language; she did not speak it in her own family circle: Spanish was there the language; according to Edward Cebrian she picked up a few words of Portuguese, which was one of the languages he did not know; she certainly had not acquired a grammatical knowledge of the French tongue; she had not even in English attained to such a standard, and it is quite evident, by the examples of her writing, that in her native idiom she had not made such progress as is claimed for her. It is said that she read and sang Latin, and recited her "Pater Noster" therein, and this is claimed as exhibiting even precocious faculty; but it is open to common observation that children of tender age, singing in choirs, repeat the words of the service accurately in unison of time and tune, without comprehending their meaning, and that the acolytes serving the priest at mass follow him with their responses in a language that they do not always understand, but which they have learned by rote, although they may, in a manner, appreciate their relation to the solemn occasion.

MARIA'S FREQUENT SERVICE AS SPONSOR.

Much stress has been laid upon the importance of the fact that Maria acted as godmother for the children of Mrs. Ceb-

rian and that therefore she must have been competent, and this was one of the reasons that Father Antonio gave for his opinion that she was of sound mind, and a record was produced by him which showed that on February 5th, 1891, she had been godmother and her brother Vicente, godfather, for one of the Cebrian children. It is argued by counsel that she must have had a high degree of intelligence in order to participate in this ceremony as sponsor, whereby she assumed great responsibilities, to stand in place of the parents, if need be, and that she understood and gave the answers necessary to the questions addressed to her by the priest, but it frequently happens that on such occasions, very young persons act in that capacity, sometimes those who are only thirteen or fourteen, and that the priest not only asks the question, but gives the answer which is repeated by the sponsor, and this is the usual formula. On this particular occasion, it appears from the testimony of Father Antonio, and from the record produced, that José Vicente, the godfather, who participated in the ceremony, did not make the responses the same as Maria. Father Antonio was asked these questions, and answers as follows:

"Q. He participated in that ceremony? A. Yes, sir.

"Q. He made responses the same as Miss Maria? A. I guess not; no.

"Q. He was one of the sponsors? A. Yes, sir, he was.

"Q. Why didn't he? A. Most probably he didn't know how.

"Q. That is the only reason, that he didn't know how?

"A. I guess, yes.

"Q. Didn't know how? A. Yes, sir.

"Q. You were acquainted with him and knew him?

"A. Yes, sir.

"Q. You knew him and say the only reason that he did not make the responses and participate in the ceremony was that he did not know how? A. I said probably he did not know how."

WHAT IS REQUIRED OF A SPONSOR.

This was the answer of Father Antonio who performed the ceremony of baptism, which required, as it seems, that

the sponsors should make answers which betoken their spiritual and temporal obligations to and for the child. It is claimed that each of the sponsors must have an intelligent apprehension of their acts and of their words, and it is argued that Maria's answers were spontaneous and recognitive of her responsibility, and conclusive of her competency; but over against this we have the fact in this particular ceremony that one equally bound to these conditions, to wit, her brother Vicente, was almost stone deaf, and that that was the reason that he made no vocal responses to the questions; there is nothing in the church records to disclose this fact, but we are asked to infer therefrom that both sponsors took part in them, whereas from Father Antonio's evidence it appears that Vicente did not, because probably he did not know how, and from other evidential sources it is seen that Vicente was unable to respond because through his defective hearing he could not make out the questions, and so he made no actual responses, yet he went through the ceremony and satisfied the requirements although he never said a word. It is also argued that because Maria was devout and performed her religious duties with punctuality that she must have possessed testamentary capacity, but it goes without saying that children of six or seven years of age, certainly of seven, may receive the sacraments, and, indeed, it is obligatory upon those who are in charge of such children that they shall be induced to attend to these duties at least as early as the age of seven, and Maria adhered to these devotional habits throughout her life, the same as when she was a child in years as well as in understanding.

MARIA'S INTEREST IN LITERATURE. HER LIBRARY.

Counsel comment upon the interest of Maria in literature as evinced by the number and character of the volumes constituting her library, which show her mental culture, even intimating her familiarity with the higher tenets of theology and her knowledge of the Lives of the Saints, which counsel say is a history in itself of Christianity, a wonderful book, in which it is suggested she was well versed; this book, which is written in Spanish, and comprises five volumes, averaging

six hundred pages to the volume, all fine print; there is no mark or inscription in any of these volumes, and very little in or about them to indicate that they have been subjected to severe study; they seem to be about as clean as when they came from the press. It is said she had a special fondness for Spanish books, and it has been noted in connection with the evidence of Mrs. Highton that she was peculiarly acute in her interpretation of some of the characters depicted in the works of fiction, such as Don Quixote, the meaning of whose satire she penetrated with unusual acumen.

COMMENTS ON CONCLUSIONS OF COUNSEL.

If we are to accept the conclusions of the counsel for the proponent as to the testamentary capacity of the decedent she was a person of unequaled natural gifts and of uncommon cultivation of intellect. Was she not possessed of the full faculties of the mind, memory, will, understanding; she had an extraordinary memory, strong and powerful, a splendid and retentive recollection, names, dates, faces; every witness, quoth counsel, bears testimony to the marvelous development of this faculty; a perfect apprehension of everything about her, relatives, friends, places of travel; understood all about her natural and moral duty to every one; well versed in literature, her library showed her mental culture; fond of books; the character of her books proved her familiarity with general literature, the Bible, Shakespeare, Cervantes. history, poetry, philosophy, religious books, novels, she read the books she owned and treasured.

NO EVIDENCE THAT MARIA STUDIED THESE VOLUMES.

If the mere ownership or possession of books necessarily implied their reading Maria might be said to have read considerable, but there is no sufficient evidence that she was a sedulous student of Shakespeare, the Bible, or of any of the learned treatises and scholarly tomes alluded to by counsel; what is called her "library" were not originally her books, they had belonged to Ignacia, and so far as examination goes there is not an inscription in those volumes traceable to Maria's pen; possibly there is an exception here and there,

but as a rule this is true; they cover a wide range of reading, in English from Shakespeare, Walter Scott and Swift, to Dickens, Bulwer-Lytton and Lew Wallace; in French Jules Verne, and in translation Goethe's "Faust"; besides the many volumes in Spanish, among them is a worm-eaten volume, "The Commentaries of Cesar," translated into Spanish accompanied with the Latin text, which has on a flyleaf, "I. de Laveaga, 322 Geary St.," this volume bears the imprint year "MDCCXCVIII" (1798). In some of these books, as in the English edition of Shakespeare, we find the inscription on the flyleaf, "Miss I. de Laveaga, 322 Geary St., San Francisco, Cal.," and under that in pencil, "Josie de su queridisima tia Maria," and in the lower left hand corner of the same flyleaf, "Dec. 1904"; and in the Spanish book "Monje Negro," at the top of the page on the flyleaf, "Miss I. de Laveaga, 322 Geary St., San Francisco, California"; and and at the bottom of the page in pencil, "Recuerdo de mi Maria queridisima, San Francisco, 1914"; and in another book, "Los Novios," on the inside of the cover, in ink, "Miss I. de Laveaga, 322 Geary St., San Francisco, California"; and then on the flyleaf opposite, "Josie Cebrian de mi queridisima Maria"; the name in ink, is in the writing of Ignacia, in two other volumes, "Don Juan de Austria," Ignacia's name is not written, but there is in each, at the top of the flyleaf, "Josie from Mary," and towards the bottom of the page, the figures "1895"; in another book, "The Last Days of Pompei," in English, by Lytton, the only inscription is in pencil at the head of the title page, "Josie from dearest Aunt Maria"; all of these pencil inscriptions are in the handwriting of Josephine Cebrian, and they serve as samples of the most important books in the list; in none of these is there any writing by Maria; it is the theory of contestant that these pencil inscriptions were inserted during the pendency of the trial of this case; they have the appearance of recent origin. The original list of these books was made by Josephine, as she said, from the books in the book-case, and the lists offered; they are said to be taken from the original memoranda, which, although made not long before she testified, was no longer in existence, and the typewritten memorandum was produced as

being a copy of her list, had been interlined, corrected, edited, names erased and substitutions made in different handwritings, and after that a revised list made, and both lists offered in evidence as the "List of Books belonging to Miss Maria C. de Laveaga."

THE BOOKS NOT ORIGINALLY HER PROPERTY; PART OF IGNACIA'S LIBRARY—MARIA NOT CONVERSANT WITH THEIR CONTENTS.

But there is nothing in the books themselves, as has been said, to show that they were her property originally, all the indicia showing that they had constituted a part of the library of Ignacia, and had nothing to prove that Maria was conversant with their contents, and while the bestowal of a book may be evidence of affection and esteem of the most exalted type, there is nothing to indicate in Maria's handwriting that she presented any of these books to anybody. In some other books, however, we find her name on the flyleaf, as in a book entitled the "Martyrs of the Coliseum," by Rev. A. J. O'Reilly, on the flyleaf of which appears, in ink, "Maria C. de Laveaga," written by her; under that is in pencil, "To the girls," in the handwriting of Josephine Cebrian, as testified to by Mr. Cebrian himself; he did not know when the pencil writing was put there. In another book, a translation into Spanish from the German work, "Schmidt's Tales," on the flyleaf is written "Maria C. de Laveaga," in her handwriting, and below it is written "21 April, 1888, Paris, 27 Avenue Marceau," this was not written by her, but by Jennie de Laveaga, that is Juanita, now Mrs. Valdespino. In another book there is a rubber stamp impression repeated three times, "Melle M. C. de Laveaga"; from this book there was a flyleaf torn, but Mr. Cebrian had no idea when or by whom that was done, he had no explanation to make about the loss of that flyleaf, it was gone the first time he saw the book, when that was, he did not know. In another book, in Spanish, entitled "Doña Luz," there was written the name of "Maria C. de Laveaga" by her in pencil, on the top of the front page, and there were other rubber stamp names three times in the book on the back and once on the front; still another Spanish book, "Corona Catolica," by J. Gallardo, on

the flyleaf of which are two lines written in ink, "M. C. de Laveaga," and the other one, "63 Avenue d'Alma"; in one of these lines there was an erasure which Mr. Cebrian could not account for, he had been examining the book-cases the night before he testified, and out of two or three hundred books he had looked at perhaps fifty, had found these and also others of a devotional character, among them a prayer-book in Spanish by the name of "Nuevo Novenario Selecto," translated into English it is "A New Selected Novenary," in the flyleaf there is a line written in pencil by Maria, "M. C. de Laveaga"; no other writing in that book. In another book in Spanish the title of which is "Ejercicio Espirituel Cotidiano," in English translation it is "Daily Spiritual Exercises," there is in her handwriting in pencil, "M. C. de Laveaga"; and in another book in Spanish "Novisimo Officio Divino," which in English means "Newest Divine Office," there is on the flyleaf "M. C. de Laveaga," written by Maria, and below "63 Avenue d'Alma, Paris," in a different handwriting. He thought this addition of the address bore some resemblance to Juanita's handwriting; as to the figure "63," he did not know whose handwriting it was. Apart from these examples of books of devotion and, perhaps, some other similar books of a like character, there is no inscription by Maria. It is a far-fetched conclusion that she was versed in these volumes, outside of the primary prayer-books, novenaries, and catechisms, all within the comprehension of a child.

MR. MOLERA'S OPINION AND REASONS.

Eusebia J. Molera testified that he lived here for over forty years; he was a civil engineer and architect; knew the De Laveaga family, had been a business partner of Mr. Cebrian; he visited the De Laveaga family on Geary street; had luncheon there; at that time he lived on Stockton street, between Clay and Washington; the witness, at the time of giving his testimony was living at 2025 Sacramento street; in the fall of 1874, or in the beginning of 1875, at the time of the accident to Miguel when his arm was broken, he visited him often and then met Miss Maria; subsequently, in December, when Mr. Cebrian married Miss Josefa, he at-

tended the reception there; exchanged greetings with her; both Maria and he were godparents of Edward Cebrian, in September, 1882, at the church of Guadalupe, Father Garriga officiated; she made the responses, he did also; Maria and he spoke about the new relationship they had assumed and their responsibilities as compañeros, or godparents; compadre and comadre; they generally spoke in Spanish, sometimes in English; he saw her on the street with the children of Mr. and Mrs. Cebrian; once the children, the girls, wanted to go somewhere, but she would not let them, and they told him that she was very exacting; the girls were then about 12 or 13 years old. He frequently saw Maria on the street with the children, also at his house and at the house of his sister-in-law, Mrs. Anna Wohler. Maria's acts, conversation, demeanor and deportment were perfectly rational. He went to Europe in June, 1900, he went with Dr. Jules Callandreau; he visited Paris, he called at the house of the Cebrians, in the Rue Hoche, and met the members of the family and Maria, also "Vincent" or J. V., the son of Miguel; Dr. Callandreau and they called together; Maria engaged in conversation with them; he traveled about a good deal for five months; visiting Paris three times, each time he visited the Cebrian house; dined with them; Maria being present; on the second visit Dr. Callandreau was not with him, he had already gone home; on their first visit they were there more than an hour; when he dined there he spent three or four hours; when he saw Vincent there he observed him talking with Maria; he left Paris finally for home in October, 1900; bade them all good-by; on his return he saw the family again on their arrival at their home on Octavia street; in or about 1903 or 1904; visited them and had conversation with Maria about their travels, said to her that she must be pleased to be back in San Francisco, she said "no, no, Paris for me"; he said that he thought this place was preferable and their friends were here and this was everything to him; but she repeated that Paris was better, streets cleaner, houses handsomer, churches more numerous and finer, more places of amusement and greater opportunities of diversion, and so on, enumerating Parisian advantages and attractions; he had

other conversations with her on many occasions; she was very fond of the Cebrian children, and they of her; his home at that time was where it is now. On the morning of the fire in April, 1906, he saw the family at the gate of the Presidio, where they went for refuge; he spoke to Maria there; he spent a night at the Presidio, then returned to his home; saw the Cebrians frequently after that until they went to Europe; he saw Maria shortly before they left, at their house; it was a general call; he did not remember any particular conversation on that occasion; Maria was very modest and retiring in manner, natural voice; during all the time he knew her, her acts, conduct, conversation and deportment were those of a rational person; sound mind. He was a native of Spain and came here in 1869; in his country and with his people it is the custom to send the girls to convents and they are taught modesty and reserve and acquire and retain such habits so that when grown up, as ladies, they appear to strangers as shy and diffident, and those who are unacquainted with them may consider them short of intelligence because of their quiet demeanor, when it is only a result of their rearing; so it was with Maria.

EFFECT OF EVIDENCE OF MOLERA—COMPARED WITH OTHER WITNESSES FOR PROPONENT.

Her appearance, modesty, shyness, reserve, might give the impression to a stranger that Maria lacked intelligence; this was Mr. Molera's impression; she was very chary of talk with strangers, she might exchange a few words, but there was nothing that could be called conversation, no interchange of ideas with them; this was the effect of the evidence of Mr. Molera; but other witnesses for proponent, commended as credible, said that Maria was talkative, bright and lively with strangers as with others, and entered with ease into conversation upon many subjects. Mr. Molera had stood sponsor with Maria for one of the Cebrian children and they had made the usual responses in the customary mode and exchanged some words about their new relationship. When they talked about travels she always expressed a preference for Paris, of which she was very fond, because it was so

much more attractive than San Francisco; no place like Paris for her, which admiration was not really remarkable, and did not necessarily signify anything more than the ordinary appreciation by a young person for a beautiful capital full of alluring attractions. Mr. Molera did not remember any other subject of conversation after their return except Paris. He never talked to her about business or property; the conversation was all about her travels, amusements, theaters, churches, the sights she had seen, her preference for Paris; her desire to return and remain there; but she never talked on any matter of serious import; their conversation was casual and colloquial; in fact there was nothing whatever striking in any of her remarks, nor anything that lived in his memory of importance.

WAS MARIA VERSED IN COMMERCIAL AFFAIRS?

Proponent's counsel claims that the contention of contestant that the decedent was not versed in commercial matters is unsupported by the evidence which is to the contrary, for it is shown that she came into immediate contact with most important affairs of business, the numerous papers signed by her and acted upon in the banks, proxies, receipts, powers of attorney, drafts, orders, checks, surety bonds signed before notaries, evince her commercial capacity; especially is this said of the receiver's bond and also of another bond which came into light through a providential and unexpected circumstance, which brought forth the bond saved in the vaults of the county clerk's office, after the fire; this may not have been a "miracle," but it was a surprise to all, when the deputy county clerk under the subpoena issued at the instance of and produced by the process invoked by contestant, exhibited that bond or undertaking given by Miguel as special administrator, as principal, and signed by Maria and Mrs. Cebrian, as sureties in the estate of Jose Vicente de Laveaga, approved August 28, 1894, for $50,000; proponent's counsel says that this was saved providentially out of the fiery furnace to condemn the case of contestant. There are numerous other documents signed by her and acknowledged before notaries, such as certain undertakings on appeal in the Anselmo case, proofs of loss in insurance matters made

out by Joseph Vincent de Laveaga, attorney at law, which is asserted to be proof positive that he came into contact and conversation with her; and dealt with her as competent and capable to act, and receipts for insurance money signed by him as her attorney in fact; and it is claimed that these incidents argue Maria's full capacity, because it is perfectly inconceivable that these documents could have been executed without the parties coming together in conversation. In reference to the receiver's bond it appears by the testimony of Henry P. Tricou, the notary who acted in that capacity when Maria signed the bond, that he never spoke to her or conversed with her at all, he never talked to her in French, or in Spanish, or in English, with all of which languages he was more or less familiar. Tricou was of French origin, born in Louisiana; he had never been in France; she did not speak to him in French, nor in any other language. There were others present on that occasion, he did not know this lady, except having been called to the house in his official capacity as a notary, and this lady was one of the signers; he could not recall the conversation he had with any of them, but he was certain he had none with her.

Counsel for proponent says that the presumption is that the notaries and other officers who took these acknowledgments and who administered these oaths performed their official duties. The presumption of the law is that official duty has been regularly performed; but this is a disputable presumption and may be controverted by other evidence, and in this particular instance Tricou himself controverts it. It is claimed that his course is characteristic of other notaries in other circumstances where Maria's signature appears. It does not seem by this record that Maria ever appeared in any court, or before any magistrate, as a witness, or to execute any document, the instruments referred to having been signed before notaries, and the argument is made that Maria's action was as automatic in one case as in another, it all being treated as a simple formal matter; the other notaries who took her acknowledgments and verifications were not called to testify as to what actually occurred at the time of their transactions with her, at least two of them having died prior

to this trial, Blood and Meininger. Tricou had been a notary for twenty-odd years and the others were also old notaries.

MR. COSTA'S ACQUAINTANCE WITH DECEDENT—HIS OPINION AND REASONS—NEVER HAD A THOUGHTFUL TALK WITH HER ON ANY TOPIC.

José Costa testified that he resided at 1926 Pine street; he had lived in this city for thirty-eight years, coming here in 1873. The witness related incidents of his acquaintance with the decedent and her family and testified as to his visits to the Cebrian family and conversations with the members of the household, Maria being present and engaging in the colloquies. Maria took part in the conversations. He frequently dined at Miguel's house when Maria was there with others; he remembered two occasions when she was there; he did not recall talking with her specially; he saw her talking to others; he met the Cebrian family on all the returns from their trips, but did not specially remember the Yellowstone trip; went to the theaters with them; he recalled a visit to the Columbia Theater on Powell street, Miss Maria was one of the party; went also to the opera, the Grand Opera on Mission street; he also remembered introducing his niece to Miss Maria in Paris, in 1897, when he was returning from his trip to Europe; he went with his niece, on the invitation of Maria, to the grand opera in Paris, the family all went; he was a guest, with his niece and his brother-in-law, General Pons de Doña, in the home of the Cebrians for the four days that he and his niece remained in Paris; his brother-in-law remained after his departure. During their stay in Paris of four days, they lodged and had all their meals at the home of the Cebrians; Maria frequently asked his niece to play the piano and she praised the playing. The witness testified to various incidents occurring during this period of his sojourn as a guest in Paris; also while as a guest at the Cebrian home in San Francisco; also in Spain during travels in Madrid, visiting places, museums and other public buildings, churches, convents and picture gallaries; Maria expressed opinions on points of observation. Arriving at Madrid he dined with the Cebrians, Maria was there; they made a day trip to Toledo, saw various places of interest, among others the Cathedral,

where she said the carvings in the choir were beautiful; then they assembled in the hotel and back to Madrid; Maria said that she liked Madrid very much. but Paris was better; he bade adieu to her. and they met again in Paris where he and his niece were guests for seven days; this was in April, 1903; they assembled at meals and in social converse; they went to the opera, Maria with them; when their visit was over, he and his niece continued their journey home; he did not remember anything especial that Maria said except that she asked to be remembered to his sister Señora Clemente Garcia, The next time he saw her was in December of the same year, 1903, when he went to Sacramento or Truckee to meet the family on their return here; he came down the road with them and to their home; he did not recollect that he went as far as the house; he did not recollect then that he dined with them at their house on their arrival, whither he accompanied them at about 8 o'clock; he was a very frequent guest at the Cebrian home from that time until 1908, when they went to Europe; he called there four or five times a week; he was here on April 18, 1906, the day of the earthquake; he went to the Cebrian house on that morning; he did not see Maria that Wednesday morning, the day of the earthquake, but at about 5 o'clock that afternoon he saw her, they were all looking out of the window; she said, "Mr. Costa, all my buildings have been burnt," he said it was too bad; he accompanied them to the Presidio on Friday; on Saturday they returned; he often heard Maria admonish the children as to their conduct. As to her conduct, conversation, acts, behavior, demeanor, deportment, in everything, she was rational; a person of sound mind; the opinion of the witness was based on so many years of acquaintance and observation of Maria, at home and abroad. Mr. Costa never had a business conversation with Maria in all these years, nor a really thoughtful talk with her upon any topic; on many occasions he did not recall talking with her specially; had actually nothing to do with her directly; others acted for her.

FATHER FIGOLS ALWAYS SAW HER WITH OTHERS.

Father Figols, an assistant pastor of the Spanish church, born in Catalonia, Spain, testified that he had been here since

1901; it was in 1904 that he was introduced by Father Santandreu to Maria; he used to visit the house, called there several times thereafter, always went alone; his visits were social and pastoral; these visits were usually made in the afternoon; during these visits they conversed in Spanish on various topics. All her acts, conduct, conversation and demeanor were those of a rational person. In his opinion, she was of sound mind, his reasons being that he never noticed anything about her that was not that of a person of sound mind; she would follow conversation of other members of the family; she would start a conversation. Father Figols said that he had given communion to a child at the age of eight years, but generally here it is eleven or twelve years. He had but one brother here; he noticed Maria at church usually when there was some feast or celebration, she may have been there at other times, but he had no distinct impression about seeing her on such occasions; when he saw her at her own home, at the Cebrian house, she was always with others, members of the family; she and other members of the family went to confession to him.

MRS. APELT'S INDISTINCT IMPRESSIONS.

Mrs. Felicitas Apelt testified that she was the wife of Charles M. Apelt, and resided at 736 Fell street; she had lived here since 1872; she personally became acquainted with the De Laveagas in the '80's; knew the mother, but not the father; also became acquainted with Maria before they went to Europe in 1884; went to bid them good-bye; she could not tell the date, but that was her first visit, although they had been to see her at her home, 1305 Stockton street; when she went to bid them good-bye she saw Maria; did not remember the conversation particularly. Norberta Martinez lived with Mrs. Apelt; the De Laveagas paid for her room and gave her something every month; she sewed for her and lived with her eighteen or twenty years; her husband was a shirtmaker and dealer in gentlemen's furnishings; the ladies, Maria and Ignacia, "Nacha," used to call together. She saw Maria at Guadalupe church more than once. The witness knew Mrs. Cebrian; was there at her marriage like other people in Guad-

alupe church. Norberta Martinez was not a forewoman or "boss" for her; she occupied no particular position, except to help in sewing. She saw Maria at the Aurrecoecha funeral; did not pay any attention as to whether or not she went out with the body of the congregation; saw her at communion; in all she observed of Maria she acted as a rational person; when she was in Europe she sent the witness some postal cards; she never saw her write; they were burnt in the fire; they were addressed to her and were inclosed in letters to Norberta Martinez, who handed them to her; on one side of the address, just "Mrs. C. M. Apelt," was written. She was of the opinion that Maria was of sound mind, for reasons already given; she was a poor judge of ages, she said, but Maria might have been twenty or thirty years old; Norberta Martinez worked for her not exactly as a working woman, for she was supported by the De Laveagas, and whatever sewing she did was over and above what she received from them, Norberta was not a "boss" or a forewoman, but helped her in sewing.

SOME OTHER WITNESSES CONSIDERED.

Another witness, Matthew O'Connor, testified that he lived at 140 Ninth avenue, Richmond; was at that time, and had been for twenty years, a conductor on the California streetcars; came to know Maria as a passenger seventeen or eighteen years before the time he testified; she rode with the members of the Cebrian family. In all he saw of her she was rational; she was of sound mind; her acts, conversation, and demeanor were those of a person of sound mind.

Miss Manuela Velasco testified that she was born here, but when two years old was taken to Hermosillo, Mexico, and returned here in 1899; became acquainted with Maria in 1904 at 1801 Octavia street, where her sister took her to get acquainted; she saw Maria frequently thereafter; on all occasions she was rational and of sound mind; in everything the witness saw of her she was rational.

Mrs. Maria Lugea Figols was born in Navarra province, Spain; knew the witness Mrs. Nicolini who was born in the same province, but in a different town; Mrs. Figols was a sister-in-law of Father Figols, who was assistant pastor of

Guadalupe church; she was married on April 4, 1904; had a pew in Guadalupe church, about the middle of the church; the pew occupied by Maria was to the right ahead of hers. She remembered when Mrs. Rosa Nicolini was married; it was after that time that she was introduced to Maria, on the occasion of her second visit to the Cebrian house; she had not met Maria the first time she called, but was formally introduced to her at the time of her second visit; the witness was in the parlor conversing with Mrs. Cebrian when Maria and Josie came in; Mrs. Cebrian introduced her, saying: "This is Father Figols' sister-in-law," and "This is my sister, Miss De Laveaga," who said she was glad to meet her; Mrs. Figols said the same to Maria; they had more conversation. All Maria's acts and conversation were rational; she never met her to converse with her except on that occasion, but she saw Maria and observed her in church when she was at mass. The witness was of the opinion that she was of sound mind and acted like anybody else, like Mrs. Cebrian or Josie or anyone on the occasion of her visit to the Cebrian home, and at mass she was engaged in her devotions. On her visit Mrs. Figols did most of the talking, spoke about her then recent illness, and Maria said in Spanish, "Poor thing, *probrecita,* how she must have suffered"; she also spoke about the sermons of Father Figols, saying that his preaching almost moved her to tears, he spoke with so much feeling; their talk was in Spanish; this was Mrs. Figols' only opportunity of meeting Maria socially, although she saw her frequently in church.

DR. ARMSTRONG THE CEBRIAN FAMILY DENTIST—HIS OPINION AND REASONS.

Dr. W. H. Armstrong testified that prior to the fire he had his office at 503 Montgomery avenue; he did some work for Maria there; after the fire when the "Delbert Block" was erected on Van Ness avenue he had his office in that building and did some dental work for her there in 1906 and 1907; after that at his present office on California street, southeast corner of Kearny street, in 1907 and 1908; the last time in August, 1908; had conversations with her; in that month of

August, 1908, he discovered that the cementing of the teeth that he had done in 1904 needed attention and suggested that to her, but she said "not now," that she was going to Europe and when she returned he might make it permanent; he did other work for her there; he gave her several sittings; on the 18th, 20th August, 1908, were the last treatments; he had refreshed his memory from his dental register and day book kept under his direction by his bookkeeper. All her talk and conversations and acts were those of a rational person; he found her a very rational person; in his opinion she was of sound mind, very sound mind; his opinion was based upon his observation. She spoke very little English; Josie Cebrian was with her and would sometimes take up the subject; Josie would talk Spanish with her, assisting her as interpreter; he did not speak Spanish; Josie was always with her; their conversation was usually limited to the details of the dental work.

THE COMMON FORMULA OF THE WITNESSES. WHAT SOME OF THEM MEANT BY "RATIONAL."

The common formula of the witnesses at the end of their direct examination was that her conduct, conversations, demeanor and deportment were those of a rational person; and what some of them meant by "rational" is illustrated in the testimony of Leonor Padilla, who said that by "rational, I mean she was *not idiotic.*" Miss Padilla saw Maria mostly at her mother's house, where she would call with Beatrice and Isabel; "we used to make dresses and waists and wrappers for Maria," whom we first met at the house of Mrs. Cebrian who introduced her to Maria; Leonor's mother and sister were present and Josie Cebrian and they all talked together; Maria talked about her travels in Europe; this was in December, 1903; the last time she saw her was in 1908, just before the family went to Europe. Leonor Padilla never saw Maria alone; she was always with somebody; the witness did not know what was meant by "opinion," but what she did mean was that Maria was *not idiotic.* Another witness for proponent, Adelaide Carmona, said that what she meant was that "*Maria was no fool*"; this witness had been a laundress

in the De Laveaga family for about two years more than thirty years ago; she had last seen Maria after the fire at the Cebrian house; she went there, but not to work; she was a regular attendant at the Spanish church and saw Maria there frequently.

DR. ARMSTRONG HELD NO DIRECT CONVERSATION WITH MARIA. HER INABILITY TO SPEAK ENGLISH—JOSIE CEBRIAN ACTED AS INTERPRETER.

It is noted in connection with Dr. Armstrong's testimony that although he met Maria many times in 1904, in 1905, in 1907 and in 1908, and did dental work for her, that he said she knew so little English that when he tried to talk to her he had to do so through Miss Josie Cebrian. All the Cebrians testified that Maria spoke English as well as she did Spanish, but, nevertheless, she was unable to make Dr. Armstrong understand her in either language, and he was equally unable to make her understand him; he said, "I would tell her to move her hand up if it hurt her, and her hand would go up—she would say, 'not, not yet'; I told her it would throw me off, and with the assistance of Josie, who explained to her in Spanish, she would keep her hand still"; "she did not seem to grasp what I said; Miss Josie would then speak to her in Spanish and tell her that the doctor said so and so." So it seems that although Dr. Armstrong had seen her numerous times in his professional capacity, he had never been able to converse with her directly, and had no communication, except through the medium of Josie Cebrian; he was the Cebrian family dentist, and when Maria called upon him she always came with Miss Josie and some of the children; in dealing with them he made no distinction with any member of the family, with whom he was on very good terms.

MRS. ANNA ROGER'S OBSERVATIONS AND OPINION—MARIA NOT OF SOUND MIND—ALWAYS LIKE A CHILD.

Mrs. Anna Roger worked for the Cebrian family for about two years and a half beginning about the year 1890 and then, after an absence of sixteen or seventeen months, she went back and worked for another two years and a half, leaving finally in the month of April, 1896; she was employed as a

second girl and her duties were generally to wait upon the table at luncheon time and sometimes in the evening, and to make the rooms upstairs; in the afternoon she used to sew. The family was made up of Mr. and Mrs. Cebrian, Miss Maria de Laveaga and the children, Mamie, Josie, Edward, Louis, Harry, Rafael, Isabel and another, a little one. Mrs. Roger was not married when she began to live with the Cebrians, her name was then Furon. While the witness was employed there, Maria was always in the house. Maria did nothing for herself; this witness would comb her hair every day and aid her in dressing; if the day was fair, Maria would go out with the children and the nurse until lunch time, and then afterward she would stay at home or might go out again with them when the two girls came home from school; she would go to the nursery or stay in her room doing nothing, except, once in a while, a little sewing; the witness usually used to sew every afternoon in the room of Maria, who did not do much of anything. Sometimes she would see her with her prayer-book, but did not observe her reading any newspapers, or any other books; she did not talk very much; had very little conversation with her; never talked to her about music; the witness was French by birth, but learned a little Spanish in the Cebrian family; she spoke very little English when she went there, but gradually acquired some knowledge of English and Spanish. The result of these years of observation of Maria was that Mrs. Roger was of the opinion that Maria was not of sound mind; she used to act like a child; play with the children, just like they did; generally she was good-natured, but once in a while she would get mad; she was always the same, however, like a child.

MISS ANNA GRESMEIL, MARIA'S MAID, CORROBORATES MRS. ROGER.

Miss Anna Gresmeil was a native of Germany and came to the United States in 1891, living ever since in San Francisco. She went to the Cebrian house in the fall of 1892, about October, and for about a year thereafter, as a maid. Mrs. Roger was there a few months before her. Her duties were to attend to Miss Maria de Laveaga in the morning; not dress her exactly; hook her dress, button her shoes and such details as that, and

during the day Anna would straighten out the rooms, and then sew also occasionally and serve at the luncheon table; in the Cebrian family, when she went there, were two grown-up daughters, Mamie and Josephine, three boys, Edward, Harry and Louis, and a smaller one, Ralph; Maria also was of the family and there were visitors sometimes. In the forenoon, after breakfast, Maria would go out with the children and the nurse, and then she would come home and get ready for luncheon. The witness substantially corroborated Mrs. Roger as to the routine from day to day, and the result was, that, in her opinion, Maria was not of sound mind; she never acted for herself; if she was of sound mind she would have acted and have done things for herself, but she had not been so doing; she had others to do for her, and so she came to the conclusion that Maria was not competent.

EVIDENCE COVERS THE PERIOD OF MAKING WILL.

These two witnesses were in the Cebrian household at the time the will was made and for some time previous to that and thereafter, and there is nothing to show that they were unworthy of credit, except as may be argued from the fact that they were domestics and not on the upper grade; but it is not said that they were untruthful and they had daily and hourly occasion to observe Maria, and they are in no wise implicated in interest on either side of this controversy; their sphere may be humble but their testimony true within its range. They both testified that when Maria went out of the house with the children the nurse always went along; and there was some effort made to establish that Maria was in charge of the children. Mr. O'Connor, the car conductor, testified that in 1892, when he first saw Maria, she used to take two little girls who were between 5 and 8 years of age out on the car with her, and he was positive on that point; he could not be mistaken, but the pedigree proves that in that year there were no two little girls, Mamie being 16 and Josie about 15 years old.

EVIDENCE CIRCUMSTANTIALLY CORROBORATED.

Anna Roger and Anna Gresmeil were corroborated in other particulars, as for instance, that Maria did not talk at the

table and she sat there with the children. Both of these maids so testified and they were borne out by others. Edward de Laveaga said that his aunt, Mrs. Cebrian, Mr. Cebrian, and his own father used to sit at one end of the table and engage in conversation on various topics, but his aunt Maria always took her seat at the boys' end of the table and would laugh when they laughed, but he did not remember that she ever said anything. Anna Roger was asked in cross-examination if she ever saw Mr. Costa talk with Maria at the table and she said "no," except "how do you do?" Beyond that she never saw Mr. Costa converse with Maria. When Mr. Costa was asked a similar question he answered that he very seldom had any special conversation with Maria at dinner. The two domestics had given their testimony about twelve months before Mr. Costa took the stand. Dr. Perrone also confirmed their statement, when he testified that he very seldom engaged in conversation with Maria at table because he was seated near Mr. and Mrs. Cebrian and Maria was sitting on the other side of the table with the children; Dr. Perrone could not "listen at her" because he was engaged in conversing with the chief of the family and Madame Cebrian, but he could see at the other end Maria sitting among the children; "always among the children."

HARRY CEBRIAN'S TESTIMONY ABOUT DECEDENT'S ABILITY TO CONVERSE AND WRITE.

Harry de Laveaga Cebrian testified at great length about conversations with his aunt; she told him she had made a will and left it with his mother, but wanted him to say nothing about it, and he never said anything to anybody about it during her lifetime; she had a wonderful memory for dates and events, made use of every mental faculty that a normal person usually does; all that Harry had testified had been evolved from his own memory; of course it had been assisted to some extent by what he had heard in the courtroom in the progress of the trial, but on the whole it was the result of his recollection of his conversations with his aunt Maria; was well posted as to all her possessions; *she wrote fluently, without stopping or hesitating.* Harry testified that he received

a watch purchased by decedent in Europe as a present for him and sent through his parents to him, but it was proved by the deposition of the salesman that it was bought by his father in Tiffany's in New York three months after the death of Maria. Frederick Brunner, the salesman for Tiffany and Company, the jewelers, in New York, testified that he sold a watch to J. C. Cebrian, May 3, 1909, for cash, delivered to Cebrian personally, engraved with initials in monogram, "H. de L. C.," delivered on May 5, 1909, sold for $110. The testimony of the other members of the Cebrian family was much to the same effect in essentials, all going to the point that Maria was sound in mind and memory and rational in all respects.

Edward I. de Laveaga testified that he never had any conversation with his aunt Maria; in answer to a question she would say "yes" or "no"; she never conversed; what he meant by conversation was the interchange of thoughts or ideas, an exchange of relevant and responsive thoughts, and in this respect she could not converse.

Many pages might be used in an endeavor to consider the testimony of other witnesses on either side, but it would be merely cumulative, and if needed hereafter the court's memoranda are available.

WAS MARIA ASSISTED IN MAKING THE WILL?

Was Maria assisted in the preparation of this will? Counsel for proponent says that it is not contested that it is her handwriting, and that the record shows that she wrote it without aid except the advice of her brother Vicente, and that she had some general knowledge of legal proceedings and the forms of legal documents and that this may account for some of the formal phases in this document; and it is asked, What is the evidence that shows that this paper emanated from any source other than her own mind? The question is answered by its asker, that there is no evidence inherent or extrinsic to induce any conclusion that she was not perfectly competent. We have already alluded to Mr. Cebrian's testimony in reference to his knowledge of the paper, that he knew nothing of it and furnished no form or model. It must,

therefore, in shape and substance have come from the mind and hand of Maria. Nothing whatever to assist her at the moment of its manufacture. As to the advice of Vicente, the testimony is quite vague and that she carried the details in her memory so perfectly as to contrive so correct a legal form without any prompting is difficult to credit. Sister Claire testified that when Edward Le Breton asked her if she thought Maria made this will she answered, in a manner perhaps not definitely responsive, that Maria showed her wit and wisdom in consulting someone who was a little more experienced than she was in the dispensing of so large an amount of money. The Cebrians deny that they were consulted, and the counsel contend that she was so expert in such matters as not to need anybody's aid in the premises. If she showed her wit and wisdom in consulting others, according to the suggestion of this witness, whom did she consult? The Cebrians make denial and affirm that it was her spontaneous act, and there was nobody else on the ground to advise her. Cebrian was there alone with her for about twenty-five minutes. As to what transpired during that interval we have his word. In the nature of the case we can have no other word. Some repetition upon this point must be indulged, because it seems to be assumed that the court can go no further than to accept this statement, and that, consequently, the presentation of the paper itself by the proponent, virtually the sole beneficiary, is proof of its probity. There is neither inherent nor extrinsic evidence to the contrary, say her counsel; it bears upon its countenance the imprint of veracity and there is no one to contradict the assertion that it was entirely the intelligent work of its apparent author.

HOW THE WILL WAS MADE.

As to the handwriting, it is said that she wrote fluently without stopping or hesitating, and she could spell as well as the average. Indeed, if one of the witnesses is to be believed, she could dictate to others and impart instruction in the written and oral elements of language. She is in her room alone, without any book of forms, without pattern or precedent to guide her, without any aid whatever except her

recollection of what Vicente told her, to write her will on a piece of paper, that was all, only to be careful that it should have no initials, no printed matter and all written by her own hand. Primed with these precepts she undertakes to dispose of an estate in value, in round numbers, of two millions of dollars, of a complex character, in the creation of which she had no hand or part, the common inheritance of herself and her brothers and sisters from their parents, none of the children having produced a dollar of the original capital, all coming from their ancestors Don José Vicente and Doña Dolores, whose sense of natural equity and repugnance to ruinous and scandalous litigations are exemplified in the provisions and injunctions of their own testaments, by all means possible to keep out of court, and in which Maria was committed to the care and protection of the elders, as long as she might live.

CONFIDENTIAL RELATIONS BETWEEN TESTATRIX AND BENEFICIARY.

At the date of the instrument here in question, but two of those encharged with the trust survived, the proponent beneficiary and her brother, the contestant, one the virtual custodian of the person, the other the actual custodian and manager of the estate. Neither was appointed guardian by court order, but if we could be permitted to construe the wills of the father and the mother according to their tenor the elder brothers and sisters might be considered testamentary guardians for life of this younger sister Maria. Most fervently and for her life was this charge made upon them. By an understanding Ignacia took the personal care, Miguel the charge of the local property interests. Ignacia dying, Mrs. Cebrian, as we have seen, assumed the charge of the person, and while she was in such personal care Maria made her will in favor of Mrs. Cebrian. It is said that she gave to Miguel a substantial portion of her property, but terms are relative; he received say less than one-twentieth of the possessions which he had managed for her for three decades, without any recompense. Sufficient has been said on this score.

The relations of Maria and Mrs. Cebrian as outlined were peculiarly confidential and intimate; nothing could be closer; no influence more immediate; no tie more binding except that which joined the proponent and her husband, and how close and firmly fastened that was and is may be seen by the thread of the testimony in this case.

In such circumstances this paper was produced, omitting mention of Vicente, leaving to Miguel a comparatively small portion of the estate; a trifle for charity, something for masses; a benefaction to the children of Clemente Laveaga; clothes and furniture and jewels to her nieces Mamie and Pepita; all remaining to her sister Pepa, or to her children if she should not survive.

WHAT MAY BE CONSIDERED IN SUCH A CASE.

It is argued that if the person be of sound mind it matters not whether the will be equitable or inequitable, just or unjust, the testator has the right to do as he pleases with his property; but, nevertheless, equity, justice, the relations of the parties, the surroundings of those benefited in connection with the testator and other points, may be considered in connection with the transaction where the competency is questioned or susceptibility to influence suggested.

In such a case the improbability of a person ignoring or discriminating against one who had been a great service to her for many years and who had conserved her estate without the diminution of a dollar, indeed with increase, and without retaining anything for personal benefit, is a proper subject of inquiry, as to whether if she were of full faculty and free from the impediment of influence she would have done otherwise; and it might be inferable that those who had been in such close propinquity and who were the beneficiaries of her bounty had improved their opportunities to their own advantage.

THE COMPOSITION OF THE WILL.

As to the composition of this instrument, it is difficult to reconcile its inherent characteristics with the statement that she wrote fluently without stopping or hesitating or that she had no assistance in framing its manuscript. As a legal

document, in form, abstracted from other considerations, it may be considered correct, but here again there is a problem as to how she managed without aid in the seclusion of her apartment to express her ideas or intentions with such statutory exactitude. It is asserted that she had been informed as to the law, and there was no necessity to call in a witness and no need of a notary, and she did not want to make it public; she had told Harry that she had made a will and left it with his mother, but wanted him to say nothing about it, and he never did during her lifetime. It was a family secret with the Cebrians and kept from the knowledge of Miguel until it could no longer be concealed.

DISCREPANCIES IN TESTIMONY AS TO HANDWRITING.

About this matter of Maria's facility in writing there are obvious discrepancies in the testimony of the witnesses for proponent as in the text of the script of decedent. Mr. Cebrian said that she wrote with facility, as readily as anybody; and, yet, he had written to Miguel as an excuse for Maria's not writing, "you know how much it costs her to spell and write"; and it is shown in the record that every one of the writings of Maria passed under the inspection of the Cebrians. It is not too much to say that not one of the few writings attributed to her is free from signs of interference.

The will is written on one side of a sheet of foolscap, lined, the photograph does not of itself suffice to satisfy expert examination; the original must be before the eye of the examiner; and when so placed we have to consider the evidence as to her ability to write and to spell in connection with this paper; and the proposition that she completed it all by herself alone. She was at least more than 35 years old at that time; had all the advantages of education accessible to the other members of her family; it is said by the Cebrians that she was capable of writing with accuracy and fluency, and without stopping or hesitation, and we have here the most important exhibit of her proficiency in penmanship. She begins the invocation, "en nombre de Dios Amen," with a small initial "e" in "en," the word being made with two strokes of the pen, the second word "nombre"

the "m" is first an "n" and then altered into an "m," the word "ochenta," in the fifth line, has the appearance of having been first written without the initial letter, which is afterwards rather awkwardly prefixed. She had difficulty with the familiar name "Cebrian," which she misspelled in a manner difficult to reproduce; she seems to have started "C-e-b-i-e-a-n" and then attempted to make an "i" out of the second "e" by placing a dot over it, and then crossing out the "e" by a stroke, and then the effort ended and the name was written without the "r." So with the word "Miguel," naming her executors, she wrote first "Miguel" and then inserted another "l."

THE WILL CONSIDERED AS AN EXAMPLE OF HER ABILITY TO WRITE FLUENTLY AND SPELL CORRECTLY.

Certainly these were familiar names about which a competent person should have made no mistake, and this writer did make mistakes, but the mistakes were corrected in a manner. It is pointed out in this record that in some of her own signatures she made mistakes in her own name, sometimes leaving out her middle initial, sometimes dropping the "a" in "Laveaga," making it "Lavega," and sometimes duplicating the "g" making it "Laveagga," and that she was indifferent as to punctuation marks. In the will, however, her own name was accurately set down. Dottings of "i"s and crossing of "t"s, and punctuation marks, may be left out of account, but when it is said that she wrote with fluency and spelled as well as the average, we must take this instrument as an example of her ability to do either to the extent claimed.

It is said that she told Mr. Cebrian that Vicente had instructed her how to make a holographic will and when she saw it was so easy she just made it. She did it of her own accord. Was it easily done? Are there no traces here of effort or labor in the making of this manuscript? It is quite plainly the product of much manual exertion. If she was not following copy or taking dictation, she was certainly engaged in hard work in the writing of this will; it is not an example of fluency in penmanship nor of accuracy in spelling; we

find the word "limosnas" misspelled; other words and letters with difficulty traced or written; and the whole document exhibiting deficient mental culture, if not intellectual incompetency.

In connection with the method of producing this paper reference is made to the testimony of Mr. Cebrian in regard to his contemplated preparation of an affidavit for Maria to copy to be used instead of a deposition in the Anselmo case.

CASE VIEWED FROM EVERY POINT—CONCLUSION OF COURT.

The mere fact that one can write does not imply soundness of mind; there are many writers who are quite unbalanced or defective, yet their writings taken alone would deceive even the elect; but we must consider the circumstances and inquire into all the facts and history, the conduct and the surroundings of the person whose mental condition is at issue before passing judgment. We must view the case from every angle of vision. Many witnesses here saw but a part, scarcely one, outside of the persons financially interested, had an entire view of the testatrix throughout her life. Granting that they testified all in good faith, many of them of unquestioned character, they differed radically in opinion on certain material points of observation; their veracity is not to be impugned because their opinions may be erroneous; counsel themselves in their ardor of advocacy have made estimates of evidence that may be wanting in the accurate adjustment of the final balance; but it is reserved for the trial court after listening to evidence and arguments for upward of a year and devoting several weeks to an examination of the record and a study of the case from every point of view to express its judgment; which is that the paper propounded be refused and denied probate.

As to Capacity of Infants to make wills, see note in Ann. Cas. 1914A, 621.

ESTATE OF JOHN J. O'GORMAN, DECEASED.

[No. 2007 (N. S.); April 8, 1910.]

Will—Bequest of Interest in Estate—Acquisition of Interests of Other Beneficiaries.—A bequest in a will of all the testator's "interest in the estate" of a named decedent will be construed to pass not only such interest as vested in him as a beneficiary of such estate, but also such further interests as he may have acquired in the property thereof by succession or bequest from other beneficiaries, where such estate was in process of administration at the time of the death of the testator, and his interests therein constituted the whole of the property left by him.

Will—Specific Legacies are not Favored by the Law, and in cases of doubt legacies are held general or demonstrative, rather than specific; the reason for this is that specific legacies are not liable for the debts of the testator, and on the other hand they fail or are adeemed if the thing or fund is not in existence at the time of the death of the testator.

Will—Specific Devise.—A devise of an interest in an estate of a deceased person is specific.

Petition by legatees for final distribution.

P. V. Ross, for the legatees.

Emil Pohli, for the executor.

J. A. Kennedy and John J. McDonald, for the heirs.

COFFEY, J.—This case involves the interpretation of the last will of John J. O'Gorman, deceased, which is as follows:

"I hereby make this my last will and testament and declare all previous wills or assignments of interest null and void. I hereby bequeath and bequest all my interest in and to my interest in the estate of Thomas O'Gorman, deceased. To be distributed as follows: Unto Edward O'Sullivan, two hundred and fifty ($250) dollars; to Mrs. Dora Singer, widow, the sum of $250.00; to Mrs. Kate Cummings, the sum of $250.00; to Mrs. Mary Wirtz, a married woman, the sum of $250.00; to Mrs. A. Klinner, a married woman, the sum of $250.00; to Mrs. Catherine La Grave, widow, the sum of $250.00; to James O'Connor, the sum of $250.00, due to him

for money advanced to me; unto Bernard P. La Grave, the rest and residue of my interest in the estate of Thomas O'Gorman, deceased, for money previous advanced to me by said Bernard P. La Grave, in the sum of $500.00."

The estate owned by John J. O'Gorman, the testator, at the time of his death, was originally the community property of his parents, Thomas O'Gorman and wife. Thomas O'Gorman died in 1873, leaving a will by which he gave one-sixth of the property to his son, John J. O'Gorman, the present testator. Subsequently the widow and other heirs of Thomas O'Gorman died, leaving John J. O'Gorman as his sole surviving heir. Some of the estates of these decedents were never administered; but two of them, the estate of James Russell Burke and the estate of Thomas O'Gorman, were pending at the time when John J. O'Gorman, the present testator, made his will. This property, which was all real estate, was the only property left by John J. O'Gorman.

From this statement of facts the legatees make this contention: When John J. O'Gorman made the above will he was the owner of the whole estate originally belonging to Thomas O'Gorman. The entire title, though not yet judicially established, had, through the death of the other members of the family, been gathered to him as the sole surviving heir. With his property in this condition John J. O'Gorman made his will wherein he said: "I hereby bequeath and bequest all my interest in and to my interest in the estate of Thomas O'Gorman, deceased, to be distributed as follows": What did he mean by his "interest in the estate of Thomas O'Gorman"? Counsel for the heirs contend that he meant only the one-sixth of the estate that came to him directly by the will of Thomas O'Gorman, and that he died intestate as to the rest of his estate. But, argue the legatees, the law raises a strong presumption against partial intestacy.

A man who makes a will at all may reasonably be supposed to intend to dispose of his whole estate. Would it not be a strange thing for this testator to will an undivided one-sixth of his estate, leaving the other five-sixths to pass by the law of succession, especially when he makes the testamentary

gifts so large that they cannot be realized except in small part, from one-sixth of the estate? A layman in drawing a will (and certainly no lawyer drew this one) may very naturally have described the entire estate of the testator as his "interest in the estate of Thomas O'Gorman, deceased," for all of the property of the testator came, directly or indirectly, from the Thomas O'Gorman estate; the administration of the estate of Thomas O'Gorman was still pending; the estate of Thomas O'Gorman was still intact, never had been distributed or divided in any way; and more than all the estate of Thomas O'Gorman had, in its entirety, been gathered to the testator at the time he executed his will. The legatees conclude, therefore, that the testator meant to dispose of his entire estate, and not merely the small fraction thereof which came to him by the will of Thomas O'Gorman.

If this interpretation of the will be correct, the heirs cannot share in the estate, but all goes to the legatees; but if the court finds that the testator intended to dispose of only that part of his estate which he took by the will of Thomas O'Gorman (which is only about one-sixth of the property), then the question arises whether the bequests in the present will are specific, or whether they are demonstrative or general. If they are specific they must, for the most part, fail, for the one-sixth of the estate amounts to only $344.09, while the legacies amount to $1750, excluding interest. If they are demonstrative or general, then they are payable out of the general assets, and are saved, but they exhaust the estate, so that nothing remains for the residuary legatees and the heirs.

A specific legacy is defined by section 1357 of the Civil Code as "a legacy of a particular thing, specified and distinguished from all others of the same kind belonging to the testator." The same section then defines demonstrative legacies, and in conclusion declares that all other legacies are general legacies.

Specific legacies, it is well understood, are not favored by the law, and in cases of doubt legacies are held general or demonstrative, rather than specific; the reason for this is that specific legacies are not liable for the debts of the tes-

tator, and on the other hand they fail or are "adeemed" if the thing or fund is not in existence at the time of the death of the testator: Nusly v. Curtis, 36 Colo. 464, 118 Am. St. Rep. 113, 85 Pac. 846, 10 Ann. Cas. 1134, 7 L. R. A. (N. S.) 592; 18 Am. & Eng. Ency. of Law, p. 715.

In Estate of Woodworth, 31 Cal. 599, the will left all the testator's personal estate and one-half of his real estate to his brother. Both the bequest and the devise were held general and not specific; and it was also held that the common-law rule that all devises of real property are specific has been abrogated in California. The court said: "In a certain sense it may be said that legacies of this kind are specific; as a legacy of all of the testator's cattle, or all of his personal property possessed at his death; but it is not specific unless you can fix on the individual thing given."

If a bequest of all of testator's personal property or a devise of all of testator's real property is not specific, certainly much less can it be maintained that a devise of an interest in an estate, as in the case at bar, is specific. There is certainly no individual thing of any kind in this case that can be said to be devised or bequeathed.

In the case of Abila v. Burnett, 33 Cal. 667, a provision in the will that "my said wife shall receive one-half of all my property of which I may die seised" was declared not to be a specific bequest or devise.

If under a will leaving all the testator's personal estate and one-half of his real estate to his brother, both the bequest and devise are general and not specific (Estate of Woodworth, 31 Cal. 599); and if a provision in a will "my said wife shall receive one-half of all my property of which I may die seised" (Abila v. Burnett, 33 Cal. 667), does not constitute a specific bequest, how can it be said that a gift of "an interest in an estate" (in the case at bar an undivided one-sixth interest in land) is a specific legacy or devise? If a gift of "all the personal property" and "one-half the real property" is a general legacy and devise, certainly a gift in the general words of "an interest in an estate" (here an undivided one-sixth interest in land) must with greater reason be a general devise or legacy and not a specific one.

Under these principles and authorities the testamentary gifts in the case at bar are not specific, and hence are not adeemed by the failure, partial or total, of the fund from which they are to be paid, but are payable from the general assets, and will exhaust the estate so that nothing remains for the heirs and residuary legatees. Therefore the estate of John J. O'Gorman should be distributed to the following legatees (to the exclusion of his heirs at law and the residuary legatee); Edward O'Sullivan, Dora Singer, Kate Cummings, Mary Wirtz, Catherine La Grave and James O'Connor.

The heirs contend that the intention of John J. O'Gorman, as expressed in his will hereinbefore set forth, was to dispose of only that part of his property which came to him directly from the estate of Thomas O'Gorman by virtue of the latter's will, which consists of about one-sixth of the estate of the present testator and amounts to three hundred and forty-four dollars and nine cents; that as to the rest of his estate John J. O'Gorman intended to die intestate; and further that his will creates specific devises or bequests which are subject to ademption.

In their argument the heirs declare that the intention of the testator must be deduced from the face of the will, and that the question is not "what did he mean," but "what do his words mean"; and that if the legal effect of his expressed intent is intestacy it will be presumed that he designed that result; Estate of Young, 123 Cal. 337, 55 Pac. 1011. They argue, further, that the gifts in the will are specific, not general or demonstrative, "because there is willed a particular thing specifically distinguished from all others of the same kind belonging to the testator, to wit, his interest in the estate of Thomas O'Gorman," citing section 1357 of the Civil Code; Tomilson v. Bury, 145 Mass. 346, 1 Am. St. Rep. 464, 14 N. E. 137; Millard v. Bailey, L. R. 1 Eq. 378; Evans v. Hunter, 86 Iowa, 413, 41 Am. St. Rep. 503, 53 N. W. 277, 17 L. R. A. 308; In re Jeffery, L. R. 2 Eq. 68; Choate v. Yeats, 1 Jac. & W. 102; Young v. McKinnie, 5 Fla. 542; Bailey v. Wagner, 2 Strob. Eq. (S. C.) 1; Pell v. Ball, 1 Speer Eq. (S. C.) 48; Bothamley v. Sherson, L. R. 20 Eq. 304; Harper v. Bibb, 47 Ala. 547; Kelly v.

Richardson, 100 Ala. 584, 13 South. 785; Appeal of Smith, 103 Pa. 559; Hayes v. Hayes, 1 Keen, 97; Estate of Woodworth, 31 Cal. 599; Schouler on Executors, sec. 461.

The argument of the heirs is, therefore, that the testator intended to dispose of only that part of his estate which came to him directly by the will of Thomas O'Gorman; that the gifts in the will of the present testator are specific, and confined to the property that came to the testator by the will of Thomas O'Gorman; and that as to the remainder of his property (which is about five-sixths of his entire estate), the testator died intestate. Hence, the heirs contend, that the legatees are entitled to only $344.09, and that the heirs are entitled to the remainder of the estate of John J. O'Gorman.

The court is of the opinion that the position of the heirs is untenable, but that the contention of the legatees is correct and must be given effect. The petition of the legatees is granted; let a decree be drawn accordingly.

Dated this 8th day of April, 1910.

This Decision was affirmed by the supreme court in 161 Cal. 654, 120 Pac. 33.

SPECIFIC, DEMONSTRATIVE AND GENERAL BEQUESTS DEFINED AND DISTINGUISHED.

Whether Devises are Specific or General.—Such a discussion as comes within the scheme of an annotated law report hardly calls for any going into first principles, and a treatise on the present topic need therefore begin with a statement no more elementary than that, of testamentary dispositions, that referring to real property is called a devise and that referring to personal property a bequest or legacy. And this statement, being made, is at once to be confessed as submitting no infallible rule either, for in the reports—even those that reflect the learning of the long-departed sages—to which we turn as to the fountains of the law, we find often an indifference to applying those words according to their strictness. Perhaps, then, the statement should be that a testamentary disposition of real estate is usually called a devise, and one of personal estate usually a bequest. These devises and bequests are not all of a single character, but admit of distinctions.

"Every specific devise, by its very nature and form, plainly shows that the testator means that the devisee shall have the land given free from liability to contribute to charges not fastened upon it": Anderson's Exrs. v. Anderson, 31 N. J. Eq. 560. To define a general devise would be, of course, to state the converse of that proposition.

The importance given by the courts to specific devises and bequests is mainly on account of the immunity—not absolute, of course—these dispositions enjoy from the payment of the debts of the estate and the charges under the will. The order of resort for payment in this connection under the common law is thus stated by Parsons, C. J., in an old Massachusetts case, he giving as his authority the English case of Donne v. Lewis, 2 Brown C. C. 257: "The general rule in equity for the marshaling of assets is thus settled: (1) The personal estate, excepting specific bequests, or such of it as is exempted from the payment of debts; (2) The real estate which is appropriated in the will as a fund for the payment; (3) The descended estate, whether the testator was seised of it when the will was made or it was acquired afterward; (4) The rents and profits of it received by the heir after the testator's death; (5) The lands specifically devised, although they may be generally charged with the payment of the debts, but not specially appropriated for that purpose": Hays v. Jackson, 6 Mass. 149.

Another thing is to be said about the common law in this connection, and that is that, agreeably to it in the administration of estates, a simple contract debt could not be enforced as against lands, the latter, unless so charged under the will expressly, being susceptible to be made a fund for satisfying only specialty debts. Another preliminary remark is that under the common law all devises of land were specific.

All Devises Specific at Common Law.—At common law the doctrine obtained that a will was in the nature of a conveyance, and the first principle of land transfers was couched in the old quaint phrase, "No man can convey that which he hath not." The will spoke of the time of its making, wherefore after-acquired lands were presumed not to be in a testator's mind, and certainly he knew what he had. The doctrine did not come from the civil law and seems to have been wholly insular. Lord Mansfield, to whom it was made a reproach that he dragged the civil law into English jurisprudence on the slightest emergency, was helpless here. In Pistol v. Riccardson, 3 Doug. 361, speaking of the will before the court, he said the rule might as well have been declared the other way, but the doctrine could not be shaken.

To take up an American case: "The soundness of this doctrine—its logical correctness—is manifest when reference is had to that rule of the common law by which wills were held to speak as of the date of their execution, and to embrace only such property as then belonged to the testator and was within the terms of the testament. Under that rule, as has been well said, 'a devise of lands operated, in the nature of an appointment upon the lands held by the testator at the time of its execution. Hence, whether the land devised was described specifically or only by way of residue, for practical purposes it was

equally well ascertained,' since the residue then held by the testator was capable of identification, and was already, indeed, as fully identified in his mind and intention as the part segregated therefrom by particular description, he being held to know what property he is seised of. And therefore the doctrine we have stated, that even residuary devisees are specific, because it is to be assumed the testator had the residue of the land then held by him in his mind, and to have intended it to go to the residuary devisee as specifically as he had intended the lands particularly described to go to other devisees. Some modification of this doctrine has been admitted in American courts, in view of statutory provisions which have the effect of making wills speak from the death of the testator instead of from their execution. Our statute on the subject is the following: 'Every devise made by a testator, in express terms, of all his real estate, or in any other terms denoting his intention to devise all his real property, must be construed to pass all the real estate he was entitled to devise at the time of his death': Code, sec. 1948. Considering that testators could not have had property acquired after the execution of their wills in their minds at that time, and that it is only by force of statute, and wholly apart from the testator's intent that such property passes at all, and hence that they could not and did not specifically intend that residuary devisees should take such property, the tendency of American decisions has been—though the rule is different under similar statutory provisions in England—to hold that no devise of after-acquired real estate is specific unless the land is described with sufficient particularity to enable the devisee to identify it": Kelly v. Richardson, 100 Ala. 584, 13 South. 785, citing Farnum v. Bascom, 122 Mass. 282; In re Woodworth's Estate, 31 Cal. 595.

American Tendency to Treat Devises and Bequests by One Rule.—The English rule that all devises of real estate are specific, the Massachusetts court has said, probably never obtained in this state, and certainly has no present existence here: Farnum v. Bascom, 122 Mass. 282. In the very late case of Wilts v. Wilts (Iowa), 130 N. W. 906, the controversy was whether the debts of the estate should be paid from the proceeds of the land generally or of that portion that descended to the heirs, the will having provided for the payment of the testator's debts, devised and bequeathed one-third of all his real and personal property to his wife, and stopped there. The debts were not inconsiderable, there being nearly a thousand acres of land in the estate, and much of it encumbered with mortgages. The court said: "Here the language of the will leaves no doubt but that the testator intended to dispose of after-acquired real estate, and the evidence fails to show whether that left was acquired before or after the execution of the will. In executing the will then he could not well have known the real property in which he undertook to dispose of an undivided third, and in such a case the reason for saying all devises are specific fails. Necessarily the disposition of after-acquired

land might be general, and would be in a case like this. The subject was considered in Re Estate of Woodworth, 31 Cal. 595, the court, after quoting a statute authorizing the disposition of after-acquired real estate, saying: 'Now, a will made under this provision, by which a party should devise all the land of which he should die seised or possessed, it is obvious, would have none of the characteristics before stated of a specific devise. A party might sell and convey land owned at the date of the will, and with the proceeds purchase others, and repeat the operation continually, and those lands owned at the moment he should happen to die would pass by the will; would take the place of those conveyed. Personal and real estate would stand upon the same footing in this respect; a devise of all one's personal and all one's real estate of which he should die possessed would be equally general and operate precisely alike. The grounds upon which a devise of real estate was held to be always specific have ceased to exist.'"

The court further quotes the California case as adopting the words of Judge Redfield, in his work on Wills, to the effect that the rule that all devises of real estate are specific prevails only where it is the law that one may not by will pass real—as he may personal—property acquired, after executing the instrument; also that, under late English statutes and those of most of the states here, that law no longer stands in the old country and only exceptionally in this. The court also cites Blaney v. Blaney, 55 Mass. (1 Cush.) 107.

We need go no further, then, than to the Alabama case already cited for the rule in vogue generally here in this connection; and that is, that all devises are specific unless they are of after-acquired lands, and as to these they are general unless the property devised is so described as to admit of identification by the devisee. Even a residuary clause may carry a specific devise: Kelly v. Richardson, 100 Ala. 584, 13 South. 785; to the same effect, see In re Estate of Woodworth, 31 Cal. 595; Corrigan v. Reid, 40 Ill. App. 404; Henderson v. Green, 34 Iowa, 437, 11 Am. Rep. 149; Wilts v. Wilts (Iowa), 130 N. W. 906. And in Walker v. Parker, 38 U. S. (13 Pet.) 166, 10 L. Ed. 109, it was held that a devise of "the balance of my real estate, believed to consist of lots number six," etc., was a specific devise.

American Cases of Devise of Real Estate.—It was held in Maine that the devise of the residue of real estate, after the happening of a contingency or after certain objects have been accomplished by the disposition or appropriation of a portion of it, is not specific but general; Bradford v. Haynes, 20 Me. 105. A man devised "the use, improvement and income" of a certain lot of land on condition the devisee pay all taxes, etc., and devised a remainder over. This was held to be a specific devise: Farnum v. Bascom, 122 Mass. 282. To the same effect, generally, see McFadden v. Hefley, 28 S. C. 317, 13 Am. St. Rep. 675, 5 S. E. 812. The doctrine that a life estate may be the subject of a specific devise is that of the old case of

Long v. Short, 1 P. Wms. 403. A testatrix gave and bequeathed her home and lot in the village of Dundee if, as she said in the will, she should be possessed of one at her death; or, if she was not possessed of one, ordered her executors to pay to the devisees two thousand dollars on condition that said devisee pay an annuity of sixty dollars to her brother. There followed seven bequests of one hundred dollars each and a provision that if her estate exceeded the amount of these the executors should divide the excess among "said persons pro rata," and that in case of a deficiency each of "the above bequests" should share it in the same proportion. It was held that the devise of the house and lot was specific: In re White, 125 N. Y. 544, 26 N. E. 909. A testator devised a particular field to an adopted daughter, and another field to his nephew—the latter subject to the devisee's paying a bequest of five hundred dollars to a niece; and devised and bequeathed the rest of the land and estate to his wife, subject to a bequest of one hundred and fifty dollars to his adopted daughter. All those devises were held to be specific: In re Pitman's Estate, 182 Pa. 355, 38 Atl. 133. A testator devised a house and such ten adjacent acres of land as the executors should allot to go with it. It was held to be a specific devise: Wood v. Hammond, 16 R. I. 98, 17 Atl. 324, 18 Atl. 198. A testatrix stated in her will that she was or might be entitled to an interest in the estate of a deceased person, and thereupon devised such interest. It was held that the devisee was specific, notwithstanding it was indefinite as to value: In re Tillinghast, 23 R. I. 121, 49 Atl. 634.

An important California decision on this question is Estate of Bernal, 165 Cal. 375, Ann. Cas. 1914D, 26, 131 Pac. 375. That a residuary clause is general as to realty passing thereby, see In re Ratto, 149 Cal. 552, 86 Pac. 1107; Estate of Painter, 150 Cal. 498, 11 Ann. Cas. 760, 89 Pac. 98; Hays v. Jackson, 6 Mass. 149; Anderson v. Anderson, 31 N. J. Eq. 560. That a residuary devise is specific, provided no after-acquired real estate is included therein, see Kelly v. Richardson, 100 Ala. 584, 13 South. 785; Wallace v. Wallace, 23 N. H. 149; Floyd v. Floyd, 29 S. C. 102, 7 S. E. 42.

Specific Gifts of Personalty.—The classification of legacies under the earlier English decisions seems to have been into two sorts—specific and general. It was said by Lord Eldon, in Sibley v. Perry, 7 Ves. 522, with reference to the bequest there under consideration, "He gives first one thousand pounds stock specifically; so that the legacy would fail if he should sell out the stock, though nothing could be more contrary to his actual intention than that if he had sold out the stock and placed the money upon a mortgage the legacy should have failed. I have no doubt in private that directing a transfer of stock he means to give what he has; but there is no case deciding that it is specific without something marking the specific thing, the very corpus; without describing it as standing in his name or by the expression of 'my stock.'"

In Purse v. Snaplin, 1 Atk. 414, a testator having, in fact, five thousand pounds Old South Sea annuity stock, bequeathed that amount of that description of stock to each of two persons. There were ample funds in the estate. The case came up before Lord Chancellor Hardwicke, and it is toward the latter part of his decision that the words occur most pertinent to the point now in discussion: "In 2 Domat., title Legacies, p. 159, sec. 18, devise of a thing not in rerum natura during the testator's life held good. These resolutions are grounded on the rule of the civil law in regard to legacies consisting in quantity and number; and there is a great difference between the testator's describing the quantity in general and his determining and particularizing it by the word 'mine.' The third objection is that this legacy to Robert Purse is a specific legacy, and therefore if not found among the testator's assets must fail. To this I answer that there are two kinds of gift which by us are reckoned under the name of specific legacy. First, where the particular chattel is specifically described and distinguished from all other things of the same kind: Lawson v. Stitch, 1 Atk. 508. Something of a particular species which the executor may satisfy by delivering something of the same kind, as a horse, etc. The first kind may be more properly called an individual legacy, and if such so bequeathed is not found among the testator's effects it fails (Drinkwater v. Falconer, 2 Ves. 624); or if given first to A and then to B, they must divide it; or if it is disposed of in the life of the testator it is an ademption of such legacy. But this gift is not confined to the particular five thousand pounds Old South Sea annuity stock, but the second, which is of a more liberal nature; it is a legacy consisting in quantity and number, and not confined to the strictness of the first rule." The lord chancellor rather confused the subject by his exception of "two kinds of gift which by us are reckoned under the name of specific legacy," for later in the case he declares the legacies there to be general. It is said in Williams on Executors (section 1021), "A legacy of quantity is ordinarily a general legacy, but there are legacies of quantity in the nature of specific legacies, as of so much money with reference to a particular fund for payment. This kind of legacy is called by the civilians a demonstrative legacy." In Ashburner v. Maeguire, 2 Brown C. C. 108, a case which, according to Arden, M. R., in Chaworth v. Beach, 4 Ves. Jr. 555, Lord Thurlow took two years to decide, the latter, referring to the bequest under consideration, spoke of whether it "was given as a specific legacy, which depends on this, whether the manner in which the sum is mentioned turns it to a pecuniary legacy or, as the civilians call it, a demonstrative legacy; that is, a legacy in its nature a general legacy, but when a particular fund is pointed out to satisfy it." To the same effect, see Nusly v. Curtiss, 36 Colo. 464, 118 Am. St. Rep. 119, 10 Ann. Cas. 1061, 85 Pac. 846, 7 L. R. A. (N. S.) 592. As Lord Cranworth said of a demonstrative legacy, "it is so far general, and differs so much in effect from one properly

specific that if the fund be called in or fail, the legatee will not be deprived of his legacy but be permitted to receive it out of the general assets, yet the legacy is so far specific that it will not be liable to abate with general legacies upon a deficiency of assets": Lord Cranworth, in Tempest v. Tempest, 7 De Gex, M. & G. 470.

As would be the case with any other thing under discussion, the first point to be determined refers to nature and quality. In short, what is a specific bequest? A bold answer to the question would be "nobody seems to know," and yet it would not be an answer very far astray; but perhaps it would be safer to say it has been found difficult by the judges to define it so closely as to make it absolutely unmistakable. Said Sir George Jessel, speaking on this subject: "In the first place, it is a part of the testator's property; a general bequest may or may not be such. A testator who gives one hundred pounds money or one hundred pounds stock may not have either the money or the stock, in which case executors must raise the money or buy the stock; or he may have money or stock to discharge the legacy. A general legacy has no reference to the actual state of the testator's property, it being only supposed that he has sufficient property with which to satisfy it, while in the case of a specific bequest it must be a part of the testator's property itself. In the second place, it must be a part emphatically as distinguished from the whole. It must be what sometimes has been called a severed or distinguished part. It must not be the whole in the meaning of being the totality of the testator's property, or the totality of the general residue of his property after having given legacies out of it. But if it satisfy both conditions, that it is a part of the testator's property itself, and is a part as distinguished from the whole or the whole of the residue, then it appears to me to satisfy everything that is required to treat it as a specific legacy. I hope that the definition which I have attempted to give will be more successful than those that have been attempted before, but I can only express that hope with some degree of trepidation": Sir George Jessel, M. R., in Bothamley v. Sherson, L. R. 20 Eq. 304. The master of the rolls cites many of the later English cases as giving warrant for the view above set forth.

In Robertson v. Broadbent, 8 App. Cas. 812, Lord Chancellor Selborne defined a specific legacy to be "something which a testator, identifying it by a sufficient description and manifesting an intention that it shall be enjoyed in the state and condition indicated by that description, separates, in favor of a particular legatee, from the general mass of his estate." In the same case Lord Fitzgerald, speaking of the bequest there under consideration and at the same time of the words last above quoted, said: "The gift is not specific within the definition so carefully expressed by the lord chancellor," as if, to the knowledge of his colleagues, that officer had labored with his words to make them conform precisely to what it was he was attempting to define. Lord Blackburn, who sat in the case with the others, said

that if it was necessary to give a definition of a specific legacy, he did not know if he could come any nearer than what the lord chancellor had said, but he added, "I do not, however, like to bind even to saying that this is a precise definition." These efforts are two only out of the numerous ones put forth by the English judges to give a clear outline of just what is meant by the term.

In America the courts, some of them, have been content to adopt here and there from this numerous store, while others, less diffident than Lord Blackburn, have worked out fresh definitions. Thus, in Alabama: "A specific legacy is one that can be separated from the body of the estate and pointed out so as to individualize it and enable it to be delivered to the legatee as a thing sui generis. The testator fixes upon it, as it were, a label by which it may be identified and marked for delivery to the owner, and the title to it as a separate thing vests at once, on the death of the testator, in the legatee": Harper v. Bibb & Falkner, 47 Ala. 547. In California the subject has been made a matter of statute. "A legacy of a particular thing, specified and distinguished from all others of the same kind belonging to the testator is specific; if such legacy fails, resort cannot be had to the other property of the testator": Cal. Civ. Code, sec. 1357. In Colorado: "A specific legacy is a gift by will of a specific article or particular part of the estate, which is identified and distinguished from all others of the same nature and is to be satisfied only by the delivery and receipt of the particular thing given": Nusby v. Curtiss, 36 Colo. 464, 118 Am. St. Rep. 113, 10 Ann. Cas. 1134, 7 L. R. A. (N. S.) 592, 85 Pac. 846. In Iowa: "To be specific, a gift, whether of real or personal property, must be of a designated article or specific part of the testator's estate which is identified and distinguished from all other things of the same kind which may be satisfied by delivery of the specific thing or portion": Wilts v. Wilts (Iowa), 130 N. W. 906. In Kentucky, "A specific legacy is defined to be the bequest of a particular thing specified and distinguished from all other things of the same kind": Hill v. Harding, 92 Ky. 76, 17 S. W. 199, 437, quoting from Lilly v. Curry's Exr., 69 Ky. (6 Bush), 590, which quotation was a quotation in turn from Wills on Executors, defining the subject; Wills on Executors, 944. In Maine, "A specific legacy is a bequest of a specific thing or fund that can be separated out of all the rest of testator's estate of the same kind so as to individualize it and enable it to be delivered to the legatee as the particular thing or fund bequeathed": Palmer v. Palmer's Estate, 106 Me. 25, 19 Ann. Cas. 1184, 75 Atl. 130. In Rhode Island, "A specific legacy, as the term imports, is a gift or bequest of some definite, specific thing, something which is capable of being designated and identified": In re Martin, 25 R. I. 1, 54 Atl. 589, quoting from Dean v. Rounds, 18 R. I. 436, 27 Atl. 515, 28 Atl. 802. The American and English Encyclopedia of Law gives as a definition: "A specific legacy or devise is a gift by will of a specific article or part of the testator's estate

which is identified and distinguished from all other things of the same kind and which may be satisfied only by the delivery of the particular thing": 18 Am. & Eng. Ency. of Law, 2d ed., 714. This language has been adopted by the courts of many of the states in preference to framing definitions out of words of their own or resorting to the English decisions. Among the cases where the courts have either so adopted or so resorted are: Kelly v. Richardson, 100 Ala. 584, 13 South. 785; Broadwell v. Broadwell's Admr., 4 Met. (61 Ky.) 290; In re Matthews, 122 App. Div. 605, 107 N. Y. Supp. 301; Crawford v. McCarthy, 159 N. Y. 519, 54 N. E. 277; Smith's Appeal, 103 Pa. 559; In re Snyder's Estate, 217 Pa. 71, 118 Am. St. Rep. 900, 10 Ann. Cas. 488, 11 L. R. A. (N. S.) 49, 66 Atl. 157; In re Campbell's Estate, 27 Utah, 361, 75 Pac. 851; Morriss v. Garland's Admr., 78 Va. 215. To this much they all go, that to create a specific legacy the testator must identify the property bequeathed: Dryden v. Owings, 49 Md. 356; United States Fidelity & Guaranty Co. v. Douglas' Trustee, 134 Ky. 374, 120 S. W. 328.

From so many expressions as to what the thing is, no one of the attempted definitions departing in sense very far from another, some idea on the subject, more or less clear, must remain in the mind of the reader; but it must have been seen meantime that these specific bequests are not all of the one sort.

The passage in Roper on Legacies (volume 1, page 149) to which the court in Broadwell v. Broadwell's Admr., 4 Met. (61 Ky.) 290, went for its definition is, "A regular specific bequest may be defined, the bequest of a particular thing or money, specified and distinguished from all others of the same kind, as a horse, a piece of plate, money in a purse, stock in the public funds, a security for money which would immediately vest with the assent of the executor." It is evident that these bequests cannot all be embraced by one description. We have seen that Lord Hardwicke held bequests to be "individual bequests," which were specific, and "bequests of number and quantity," which were general.

And yet there are instances of bequests of number and quantity being held to be specific bequests. In fact, as was said in Appeal of Balliet, 14 Pa. 451, "the distinction between a specific and a pecuniary legacy and a specific and a demonstrative legacy is sometimes very nice." For an illustration let us turn to a modern Rhode Island case: "The legacy, in the twelfth clause, of two hundred and thirty shares in the Ashland Cotton Company, although not described by the testatrix as 'my' two hundred and thirty shares, seems to us to be a specific legacy. It is true that the law does not favor specific legacies, and that, where stocks, bonds and other securities are disposed of by the will but it does not designate them as composing a part of the testator's estate and the legacy may be satisfied by delivery to the legatee of any securities of the kind and the value or amount specified, a preponderance of authority favors its being a

general legacy, though the testator owned securities of the kind specified, and corresponding exactly to the number of shares or amount bequeathed: 18 Am. & Eng. Ency of Law, 2d ed., 713. The authorities however, are by no means uniform: 1 Roper on Legacies, s. pp. 204–224. The cardinal rule is to ascertain and follow the intent of the testator, and, inasmuch as wills vary so much in their surrounding circumstances, each will has to be judged largely by its own attendant circumstances. In Pearce v. Billings, 10 R. I. 102, the testator gave away of certain bank stocks largely in excess of what he owned at his death or had ever owned of such bank stocks. The court decided such legacies were general, and not specific, and that the number of shares given away merely furnished a standard of measurement of the amount of a pecuniary gift which was to be fixed by the value of the stated number of shares at the time the legacies would become payable, viz., a year after the testator's decease—an appraisal then to be made. Undoubtedly the fact of the testatrix having an odd number of shares of the Ashland Cotton Company at the date of her death, exactly corresponding with the number given away, was a circumstance to be taken into account; and that, taken in connection with all the circumstances of this particular will, satisfies us that the testatrix intended that the legatee under the twelfth section was to have that particular stock. In our opinion the legacy under the twelfth section was a specific one": In re Martin, 25 R. I. 1, 54 Atl. 589.

And yet similar reasoning did not lead Lord Eldon to a similar conclusion in Sibley v. Perry, 7 Ves. 522, already cited. There the testator having, in the will, directed a transfer of three per cent consols three months after his decease, gave several other legacies of stock "as aforesaid." The lord chancellor expressed himself thus: "I have no doubt in private that, directing a transfer of stock, he means to give what he has; but there is no case deciding that it is specific without something marking the specific thing, the very corpus; without describing it as standing in his name or by the expression, 'my stock.'"

There was another specific legacy, so decided to be, in Re Martin, which we shall come to presently, the subject matter of which must be said to have been quite intangible, which quality certainly cannot comport with the idea of an article at all, much less an article that can be fixed upon, which, as intimated in Barton v. Davidson, 73 Ill. App, 441, is indispensable. It must be, then, that in cases here and there something is to be considered outside of the plainly expressed intent of the testator, his use of "my" or his minutely descriptive words. There seems to be no escape from the position that here and there a legacy crops out that is not quite definite enough to come within the strict rule of an "individual legacy," and yet too definite to be ranked as either demonstrative or general. We shall consider

specific legacies here, therefore, as either "individual" or "unclassified."

Identification of Subject of Bequest by Ownership.—Notwithstanding the stress laid upon the word "my" or the expression "in my name" by such authorities as Lord Hardwicke and Lord Eldon, following the spirit of the civil law, as being almost essential to a testator in naming the subject of his bounty so as to impart to it the strictly specific quality, that quality can be imparted otherwise. The use of possessives is one method of indicating the subject matter, but there are others. There may be unmistakable marks about the thing, mention of which will accomplish the purpose; or the thing may be described sufficiently by stating, if with due minuteness, whence it came into the testator's ownership or just where it is to be found.

To take up these indicia in turn, and beginning with that one referring to ownership, we will cite, first, cases where the thing owned is of a miscellaneous nature, and afterward cases where it is a bond or a share or shares of stock or something of that kind.

A bequest of "all my books, historical and geographical, of Greece, of Rome," etc., was held to be specific: Mayo v. Bland, 4 Md. Ch. 484. A testatrix devised and bequeathed to her brother certain real estate, her household furniture and all the rest of her real estate. The described land and the household furniture were held to be specific gifts: In re Corby's Estate, 154 Mich. 353, 117 N. W. 906. A bequest of all my household goods, cash on hand or in bank, and life insurance, is specific: Kearns v. Kearns, 77 N. J. Eq. 453, ante, p. 575, 76 Atl. 1042. A bequest was in words, "all the money I die possessed of in several banks and bonds." Investigation brought out money and bonds belonging to the testatrix in incorporated savings banks and a sum of money on deposit also with an individual. It was held that all went as a specific bequest: In re Beckett's Estate, 15 N. Y. St. Rep. 716. A bequest of all money belonging to the testator and uninvested at his death, whether in bank, in his personal custody or in the hands of his agents, is specific: In re Fow's Estate, 12 Pa. Co. Ct. 133. A testator gave by his will all wheat of which he was the owner, stored on land belonging to him, and all grain that might be raised on such land during a year stated. It was held to be a specific legacy: Rock v. Zimmerman, 25 S. D. 237, 126 N. W. 265.

A bequest of a particular bond is specific, of course: Howell v. Hook's Admr., 39 N. C. 188. A bequest of an amount distinctly set forth of certain bonds testator held is specific: Gilmer's Legatees v. Gilmer's Exrs., 42 Ala. 9. So, also, a bequest of "my East Haddam Bank stock": Brainerd v. Cowdery, 16 Conn. 1. A bequest of all the testator's insurance stocks and other personalty was also so held: Connecticut Trust etc. Co. v. Hollister, 74 Conn. 228, 50 Atl. 750. A clause affecting a bequest of money, "the latter to be derived from my other property not mentioned in the foregoing," identifies bonds

bequeathed in the foregoing clause as bonds belonging to the testator, and the bequest of these is specific: Douglass v. Douglass, 13 App. D. C. 21. A bequest to testator's wife was of "the bank stock which I now hold in the bank," and it was held to be specific: Johnson v. Goss. 128 Mass. 433. "The balance of my stock as per my stock-book," employed as words in a will, imports the testator's possession of "ten shares of the stock of the W. & N. R. Co.," bequeathed in a preceding clause, and the bequest of this stock is specific in consequence: Harvard Unitarian Society v. Tufts, 151 Mass. 76, 7 L. R. A. 390, 23 N. E. 1006. A bequest of "all the mill stock and bank stock remaining in my name after the decease of my said wife" is specific: Tomlinson v. Bury, 145 Mass. 346, 1 Am. St. Rep. 464, 14 N. E. 137. So, too, is a bequest of "all notes of hand which are payable to me at the date of this codicil": Ford v. Ford, 23 N. H. 212. Also a bequest of "one-half of all my stock in the following named railroads, to wit," etc., "and one-half of my stock in the W. Bank": Loring v. Woodward, 41 N. H. 391.

A reference by a testator in his will to certain stocks and particular bonds as being possessed by him is a sufficient expression of ownership to render his bequest of such stocks and bonds specific: Norris v. Thompson's Exrs., 16 N. J. Eq. 542. A testator bequeathed the income of bonds, mortgages, etc., up to a stated amount, the executors to select these from property of testator of that sort, there being enough of it to satisfy the bequest over and over again. The bequest was held to be specific: Blundell v. Pope (N. J. Eq.), 21 Atl. 456. So was a bequest of "ten shares of my Essex County National Bank stock: Moore's Exr. v. Moore, 50 N. J. Eq. 554, 25 Atl. 403. A direction by a testator to pay to his wife the interest to be derived from a bond described, and after her death to his son, with the principal to go to the son's children, is specific: Baldwin's Exrs. v. Baldwin, 7 N. J. Eq. 211.

When making his will the testator owned certain securities and they remained his up to his death. The will contained a bequest to his wife of seventeen thousand dollars, "to be paid to her out of securities which I now hold, instead of cash." It was held that the bequest was specific: Allen v. Allen, 76 N. J. Eq. 245, 139 Am. St. Rep. 758, 74 Atl. 274. So, also, was a bequest of "my stock, right, title and interest" in a company named: Kearns v. Kearns, 77 N. J. Eq. 443, 140 Am. St. Rep. 575, 76 Atl. 1042. So, also, a bequest of a named sum "in notes, to be taken out of my notes as soon after my death as it can be done": Perry v. Maxwell, 17 N. C. 488. A testator made bequests of bank stock, and subsequently in the will expressed himself thus: "In case there should be any deficiency in the bank stock which I hold at my death, as compared with the amount bequeathed in my will and testament," etc. The bequests were specific: McGuire v. Evans, 40 N. C. 269. In another case the bequest was of all the shares, standing in the testator's name, of the stock in a

corporation named in the will, to those certain persons as trustees, they to distribute the dividends, as they should come in among the beneficiaries the will pointed out. The bequest was held to be specific: In re Noon's Estate (Or.), 88 Pac. 673. Decree affirmed on rehearing: In re Noon, 49 Or. 286, 90 Pac. 673.

In another case the bequest was of "one thousand dollars of the United States six per cent stock or loan of the year 1812, standing in my name on the books of the loan office, Pennsylvania, as per certificate No. 269." It was specific: In re Ludlam's Estate, 13 Pa. 188. A woman by will left her daughter expressly all she possessed and then gave her "the bond held by me." The estate consisted of some cash, some furniture and a bond. The bequest of the bond was specific: In re Weller's Estate, 2 Woodw. Dec. (Pa.) 191. "My stock" in a named bank was, it was held in another case, sufficient, with apt words of bequest, to make a specific legacy of all the stock of the bank standing in the name of the testatrix at the time of her death: In re Martin, 25 R. I. 1, 54 Atl. 589. A testator directed by his will that the executors should not sell the stock he had in a named corporation, but should hold it and pay the dividends to persons named in the will. The bequest was specific as to both stock and dividends: McFadden v. Hefley, 28 S. C. 317, 13 Am. St. Rep. 675, 5 S. E. 812.

A testator gave by will "Twenty thousand dollars out of the six per cent stock of the corporation of Washington in my name, if so much should remain out of my personal estate after satisfying all previous bequests." It was a specific bequest: Larned v. Adams, Fed. Cas. No. 8092, 1 Hayw. & H. 384. A will contained a gift of eighty-two shares of stock "whereof," so the phraseology went thereafter, "fifty shares which are now pledged as collateral for a note, shall be released by my executors from said pledge immediately on my death, if they shall not have been released before my death." Here was a strong implication of ownership, but no direct assertion to that effect; nevertheless it was held, and it would seem very properly, that the bequest of the shares was specific: In re Lyle, 41 Misc. Rep. 596, 85 N. Y. Supp. 290.

Identification of Subject of Bequest by Unmistakable Marks.—"A legacy is specific when it is the intention of the testator that the legatee shall have the very thing bequeathed": Wallace v. Wallace, 23 N. H. 149. "In order to constitute a bequest of personal estate specific, there must be a segregation of the particular property bequeathed from the mass of the estate, and a specific gift of a specified portion to the legatee": Mayo v. Bland, 4 Md. Ch. 484. It would appear that the two quotations just given express all that is indispensable in the way of pointing out the subject matter of the bequest, and the intention of the testator that the bequest shall be specific. "To constitute a legacy specific, it is necessary that such intention be either expressed by the testator in reference to the thing bequeathed or that it otherwise clearly appear from the will. This is not, how-

ever, a technical, arbitrary rule, to be answered only by the use of particular words and expressions, but is an embodiment of the general principles by which the character of legacies should be determined, each will resting for construction on the language employed and on established surrounding significant circumstances, if such exist": Morris v. Thompson's Exrs., 16 N. J. Eq. 542.

As we have seen, the old English courts insisted on a rule in this connection that they found necessary to depart from time after time. Even as to specific bequests of stock the clearly expressed "my" is no longer a sine qua non. "The general rule is that if stock be bequeathed and the testator owns the stock described at the time of making the will, the bequest must be considered specific": White v. Winchester, 23 Mass. (6 Pick.) 47; and the court cited as authority Selwood v. Mildmay, 3 Ves. 310. Under a will certain cattle, "except one pair of yearling steers," were given to one son of the testator and to another "one pair of yearling steers," at the time the will was made, the testator having just one pair of yearling steers. The bequest of these steers was specific: Stickney v. Davis, 33 Mass. (16 Pick.) 19. Where a clause of a will, standing all by itself, bequeathed certain shares of stock, the bequest was specific: Waters v. Hatch, 181 Mo. 262, 79 S. W. 916. A bequest of one carriage when, as a fact, the testator had only one, was specific: Everitt v. Lane, 37 N. C. 548.

A devise so framed as to make a gift of a crop growing on the land results in the gift becoming a specific legacy: Stall v. Wilbur, 77 N. Y. 158. A bequest of two certain policies of insurance is specific: Platt v. Moore, 1 Dam. Sur. (N. Y.) 191. A bequest of life insurance, the amount and the company being named in that connection, is specific: In re Gan's Will, 60 Misc. Rep. 282, 112 N. Y. Supp. 259; decree modified, 114 N. Y. Supp. 975. A devise of land with directions that it be sold and the result in money divided between named persons is a specific bequest: In re Brown's Estate, 1 Am. Law Reg. 126 (Pa.).

Although the thing bequeathed be not owned by the testator when making his will, if susceptible of being pointed out and distinguished from the rest of the estate at the time of testator's death, it is enough. The bequest is specific: Appeal of Fidelity Ins. etc. Co., 108 Pa. 492, 1 Atl. 233. A will provided that the homestead of testatrix be sold and the price invested for her son's benefit; after the son's death the principal to go to others named. It was a specific bequest: In re Martin, 25 R. I. 1, 54 Atl. 589. If the things falling within the terms of a legacy when enumerated (or if they had been enumerated by the testator) are in their nature specific, if capable of individuality, or if it be an assemblage of things or something capable of being separated by sensible distinctions as the property in a particular estate, then the legacy is specific: Bailey v. Wagner, 2 Strob. Eq. (S. C.) 1.

Identification of Subject of Bequest by Stated Derivation.—That is to say, by the testator's reference to the source from whence the property bequeathed became his to give. And first let us take the case where the reference was to a derivation from the estate of another. In Young v. McKinnie, 5 Fla. 542, the words in the will were: "I direct that all the property, real and personal, that I obtained from the estate of B. K., deceased, be returned to R. K., minor heir of B. K., deceased, or such portion thereof as I now have in my possession." The gift was held to be specific. So, in the same case, a restoration to the minor heir of another deceased person from whom the testator declared he had received the property given was held to be a specific gift. In Iowa it was held that a bequest of a sum of money described by the testatrix as being that received by her from an estate named was specific: Smith v. McKitterick, 51 Iowa, 548, 2 N. W. 390. In Maryland there was a devise of "my Bland Air plantation, with all the slaves, and their increase, which I derived from my uncle T., and all the personal property thereon not slaves, and used with the same at the time of my death." This was a specific bequest of the slaves and other personal property: Mayo v. Bland, 4 Md. Ch. 484. In another Maryland case the testator had bequeathed one thousand dollars to a brother and sister each "out of the portion or share of my father's estate that may come to me." These legacies also were held to be specific: Gelbach v. Shively, 67 Md. 498, 10 Atl. 247. So, too, in New York a legacy of "the five hundred dollars," stated in the will as having been bequeathed to the testatrix by her brother: See In re Getman, 128 App. Div. 767, 113 N. Y. Supp. 67.

A legacy held in South Carolina to be specific was expressed thus: "I give to my wife the whole of the property she brought me": Warren v. Wigfall, 3 Desaus. 47. In a case in Virginia where the testatrix had bequeathed two thousand dollars to each of two persons named "of the ten thousand and fifty-two dollars which I received from my uncle F. C.'s estate, it appeared that her husband had invested the ten thousand and fifty-two dollars in Virginia bonds, and these were transferred to her by his executor. It was held that the two bequests of two thousand dollars each were not specific, but money, legacies: Skipwith v. Cabell's Exr., 19 Gratt. 758.

Next, as to reference by the testator to derivation by payments looked to from persons under duty to make such. A bequest of a note and the mortgage securing it, to hold on trusts stated, reduce the obligation to cash and invest the latter as may seem best to the trustee, is a specific bequest: Farnum v. Bascom, 122 Mass. 282. A bequest to a mortgage debtor of the testator of the principal of the debt and a direction in the will to the executor to assign and transfer the mortgage to him amount to a specific bequest: Wheeler v. Wood, 104 Mich. 414, 62 N. W. 577. The legatee of "all the money due on a bond against P. and I." has a specific legacy: Stout v. Hart,

7 N. J. L. 414. So has the legatee of "the money now owing to me from A": Hayes v. Hayes, 45 N. J. Eq. 461, 17 Atl. 634. A gift of the proceeds of a bond and mortgage described is specific: Gardner v. Printup, 2 Barb. 83. A will contained a provision that "a certain bond and mortgage of seven thousand dollars, the present amount of principal due, and which I hold against J.," be held by the executors in trust to pay the interest to a named person for life, and afterward reduce the obligations to cash and divide and distribute. It was a specific bequest: Abernethy v. Catlin, 2 Dem. Sur. (N. Y.) 341.

A will provided for the taking of tolls upon a road in trust to pay a sum therefrom monthly to a named person. It was a specific, and not a demonstrative, legacy: Morris v. Harris, 19 Ohio St. 15. A testator bequeathed a debt stated to be owing him. It was a specific bequest: In re Souder's Estate, 15 Pa. Co. Ct. 285, 3 Pa. Dist. 495. So where a testator bequeathed promissory notes: In re Martin, 25 R. I. 1, 54 Atl. 589. And where one bequeathed "the amount of the following notes," describing those meant: Tipton v. Tipton, 1 Cold. (41 Tenn.) 252. A will recited, among other things, "I give and bequeath to my son . . . the sum of one thousand dollars to be paid as follows, said sum to be credited on a promissory note I now hold against him for the sum of thirteen hundred dollars." At the making of the will and the testator's death, one thousand dollars was the balance due on the note. This was a specific legacy to which the legatee's right of property became fixed by the testator's death, so that from then on the maker of the note was not accountable for interest to either the estate or its assignee: Martin v. Badger (Wash.), 114 Pac. 505.

Next, as to reference by the testator to derivation by anticipated proceeds of sale, etc.: A testator made sundry general bequests of money, and then, referring to his stock of goods, directed his executors to sell these and his real estate and divide the proceeds between his brother and two sisters equally. By a further clause in the will he disposed of the residue of the estate. The bequest to the brother and sisters was held to be specific: Kaiser v. Bandenburg, 16 App. D. C. 310. A will provided for the sale of the testator's household furniture and that the balance of the proceeds, after payment of the funeral expenses, should go to a named church. In ensuing clauses the will provided for certain legacies, after which it directed that the residue, if any, should be divided among "the said legatees in the same proportion that the several legacies bear to each other," while, on the other hand, they, in case the "sale of my property should prove insufficient for the payment of all said legacies in full," should bear, in respect of such legacies, the deficit in like proportion. The bequest of the balance of the proceeds of the sale of the furniture was held to be specific: In re Brett, 57 Hun, 400, 10 N. Y. Supp. 871. Another will provided for the sale of the testator's real estate and the application of the proceeds to the payment of debts, funeral ex-

penses, inheritance and other taxes, and all the costs, etc., of administration, so that the legacies under the will should suffer no deductions; it then provided for the payment of the balance of the proceeds to a niece of the testator. It was held that the niece took a specific bequest: In re Wilson's Estate, 15 Phila. 528. Certain described personalty was set apart by a will for raising a fund for the legacies, and it was directed in the will that "the surplus, after paying the legacies, if there should be any," was to be divided among named grandchildren of the testator. This surplus was a specific bequest: Bailey v. Wagner, 2 Strob. Eq. (S. C.) 1.

Next, as to reference by the testator to derivation in respect of negotiations, or suits in process at the time of the making of the will: A will provided that if the testator prevailed in a certain litigated claim, his wife should have one-half net of the amount recovered, and that ten thousand dollars of the other half, provided the half should amount to twenty-five thousand dollars, should be given to Q., to complete the cathedral; but if the half should be less than twenty-five thousand dollars, only two-fifths of it should so go for the cathedral, while of the rest, two thousand dollars should be given to each of five named persons and the remainder to the testator's daughter. A further provision was that if the fund failed in amount sufficient to pay "said special legacies" in full, the legatees should take pro rata. The bequests were held to be specific rather than demonstrative or general: Maybury v. Grady, 67 Ala. 147. The bequest of money to be received under a decree in a suit mentioned in that connection is specific: Chase v. Lockerman, 11 Gill & J. 185, 35 Am. Dec. 277. A bequest of that portion of the purchase money of an estate named as shall be on hand at the testator's death is specific: Starbuck v. Starbuck, 93 N. C. 183. A will provided: "I give and bequeath to my wife Mary all the amount of moneys and interest that may be recovered of and from Dr. Kirker for the purchase of the Penrose estate, to her and her assigns." The bequest was specific: Gilbreath v. Alban, 10 Ohio St. 64. A pecuniary bequest charged, wholly or in part, upon another bequest or devise, so that an intent is apparent thus to burden such bequest or devise with the payment, is specific: Walls v. Stewart, 16 Pa. 275.

Identification of Subject of Bequest by Its Location.—The reference here is to the testator's mentioning in connection with his disposing of the particular thing, and as a means of identifying it, the place where it is to be found. And first, with reference to things in custody of banks, etc. A bequest of whatsoever sum the testator might, at the time of his death, have on deposit in a bank is specific: Barber v. Davidson, 73 Ill. App. 441. And when, after so disposing in his will and calling attention to the particular banks where the deposit was, the testatrix drew out money and deposited it in another bank, where it remained until her death, the bequest still was specific: Prendergast v. Walsh, 58 N. J. Eq. 149, 42 Atl. 1049. Testatrix be-

queathed "all the money I die possessed of in several banks and bonds." It was specific: In re Beckett's Estate, 15 N. Y. St. Rep. 716. So, too, a bequest of shares of stock by reference to their being pledged as collateral, the executor being directed to have them released at once after testator's death: In re Lyle, 41 Misc. Rep. 595, 85 N. Y. Supp. 290. And see Appeal of Smith, 103 Pa. 559, where money in a bank was bequeathed to two sons. And In re Fow's Estate, 12 Pa. Co. Ct. 133, where the bequest was of all money belonging to the testator, whether in bank, in his own custody or in the hands of his agents. And Manlove v. Gant, 2 Tenn. Ch. App. 410, where the bequest was, among other things, of money in bank left after paying expenses and the doctor's bill.

Next, the contents of a store, as in the case of Kelly v. Richardson, 100 Ala. 584, 13 South. 785. There the testator had bequeathed to one person all his property excepting a stock of merchandise, books, accounts, notes, store fixtures and everything belonging to a certain store named which he bequeathed to another; the latter bequest was held to be specific.

Next, as to property at home or so described virtually: In Getman v. McMahon, 30 Hun, 531, the bequest was of "the use and control of all my personal property whatsoever on the farm and in the house at the time of my decease, and for her to have and use and enjoy the same," etc. It was held to be specific. In Re Delaney's Will, 133 App. Div. 409, 117 N. Y. Supp. 838, the bequest was of all the household furniture and personal property of whatever kind in the residence of testatrix. It was held to be specific, but that as to it the will should be regarded as speaking as of the time it was made rather than as of the death of the maker. In McFadden v. Heflcy, 28 S. C. 317, 13 Am. St. Rep. 675, 5 S. E. 812, the bequest was of all the horses, mules, cows, hogs, wagons, farming implements, and household and kitchen furniture on the plantation which the testator occupied. It was held to be specific.

Then as to property described in the will as being in the hands of the testator's agents as in the case of Fow's Estate, 12 Pa. Co. Ct. 133, where the bequest was decided to be a specific one.

Unclassified Specific Bequests.—It was said by Van Dyke, J., in Morris v. Thomson's Exrs., 15 N. J. Eq. 493: "We have but little difficulty in understanding what constitutes a specific legacy and what a general one, but from the peculiar language so often made use of in wills, the courts have had great difficulty in determining whether it meant the one thing or the other; and while the judicial decisions on the questions have been very numerous, the one way and the other, but very few settled rules can be gathered from them. It seems to be conceded that if a testator bequeaths to a person a certain number of cows, or sheep, or shares of stock, it is a general legacy, but if he add the word 'my' cows, 'my' sheep or 'my' shares of stock, it is a specific legacy, although in both cases he may be, at the time

of making the will, and thence to the time of his death, the owner of the number of cows and sheep and shares of stock mentioned in the will. This seems to be at first sight a rather remarkable distinction, but such seems to be the rule adopted by the courts and by the aid of which each tribunal has to grope its way through the unintelligible language so often found in wills. Hence another rule, admitted to be universal, is always to be resorted to in solving these difficult questions, and that is, What was the real intention of the testator? This, if it can be ascertained, is always to govern."

In that case the testator had, by the will, disposed of all his personal property except the stocks and bonds, the subjects of the bequests which were made in later parts of the will, and there being now no personal estate, other than his stocks and bonds, on which the residuary bequests could operate, the court held that his describing the residue as "my personal estate" was equivalent to saying "my" stocks or "my" bonds, and made the bequests specific and not general: Morris v. Thomson's Exrs., 15 N. J. Eq. 493. So, too, in a Texas case. The testator started out in his will by declaring his intention that his wife and daughter should share his estate equally, then proceeded to make dispositions in detail looking to that end. The result of these dispositions, however, owing to the actual state of the property, was to bring the daughter into a lawsuit and subject her probably to a loss of money, and work other such confusion. It was a complicated case, and for the daughter's relief the court fell back upon the opening general expressed intention in the will and decided that what the wife and daughter took were not specific gifts, but demonstrative: Lake v. Copeland, 82 Tex. 464, 17 S. W. 786.

A testator gave to his wife "twenty negroes of the average value of all the slaves I may possess," and to his children, "all the rest and residue of my negro slaves." They were specific bequests: Myers' Exrs. v. Myers, 33 Ala. 85. Of the shares of twelve children, to whom was to go in equal shares, under the will, the price of the homestead directed to be sold at the end of the wife's life estate in it created by the will, one child bought nine. He occupied the property and at his death left by his will "one-third of the real estate of the homestead" to his wife and two-thirds to his son. It was held that the wife and son took, not devises of the land, but specific bequests: Heslet v. Heslet, 8 Ill. App. 22. In the case of a bequest to a daughter of shares, in various amounts, of several sorts of stocks named "and also five thousand dollars of the Wilmington, Columbia and Augusta Railroad bonds," when, after testator's death, no such securities were found among the assets except the bonds named, worth thirty cents on the dollar, the daughter had a specific legacy of the bonds, and was not entitled to five thousand dollars in money: Kunkel v. Macgill, 56 Md. 120.

Gray, C. J., says, in Metcalf v. Framingham Parish, 128 Mass. 370: "If a reading of the whole will produces a conviction that the tes-

tator must necessarily have intended an interest to be given which is not bequeathed by express and formal words, the court must supply the defect by implication and so mold the language of the testator as to carry into effect, as far as possible, the intention which it is of opinion that he has on the whole will sufficiently declared." Accordingly, the testator having made several bequests of shares of stock named, when, at the date of the will and also of the death he held of such stock shares largely in excess of those bequeathed, it was held that the bequests were specific. There were legacies of money to the same persons, and the court regarded that as indicating intent as to the other legacies so held specific, on the authority of Lord Cairns, in Kermode v. Macdonald, L. R. 3 Ch. 584; Metcalf v. Framingham Parish, 128 Mass. 370. Words in a will were these: "I give to my son negroes to the amount of $3,350, negro men at $800 and the women at $600. and smaller negroes in the same proportion." It was held that this was a specific bequest of negroes, and not a money bequest with a designation of the negroes as the fund from which it was to be taken: Malone v. Mooring, 40 Miss. 247.

A testator gave his wife "five hundred dollars in personal property such as she may select," and it was held to be a specific bequest. The court said: "By our law the executor, except when he is the residuary legatee, is bound to return an inventory of the personal property, the value of which is estimated by appraisers. The personal property does not, as in England, go to the executor, but, if undisposed of by the will, descends to the heir at law. As the personal property is all inventoried and belongs to the estate after the death of the testator, a reference to it in connection with a legacy would seem to make the legacy more specific than it might be considered by the use of the same words in England": Wallace v. Wallace, 23 N. H. 149. Where a testator made bequests as of sums of money, but "in bonds" of a named class, and the amounts and names tallied exactly with bonds he owned, the bequests were specific, the court saying: "The question is, What did the language of the will mean to the testator?" Jewell v. Appolonio, 75 N. H. 317, 74 Atl. 250. A bequest of a mortgage, "subject to the payment of the income from it to testator's wife during her life," was held to be specific: In re Robinson, 37 Misc. Rep. 336, 75 N. Y. Supp. 490. The case of Perry v. Maxwell, 17 N. C. 488, was one where the character of the bequest was described by—as it were—reference. The bequest was contained in a clause of the will preceding a clause, to wit, "all the notes that will be remaining after paying of the legacies hereinbefore given." It was held to be specific. A bequest to the testator's wife of a named number of horses, oxen, etc., with the designation "her choice," after each, is rendered specific by such designation: Everitt v. Lane, 37 N. C. 548. A lessee exercised a standing option to purchase the demised premises, but before the expiration of the option the lessor had died leaving a will whereby his wife had a life estate in those

premises, with remainder to her children. The wife and children took the purchase money as a specific bequest: Buckwalter v. Klein, 5 Ohio Dec. 55. Where a clause in a will provided expressly for the payment of all debts, funeral expenses, inheritance taxes, and all expenses of administration, to the end that legacies made in subsequent clauses should suffer no deductions, and then directed the rest of his estate to be given to a named person, it is a specific legacy: In re Wilson's Estate, 15 Phila. 528. A man bequeathed eighty shares of a named stock to his stepson, after his wife's life estate in it, bequeathed to her, and fifteen hundred dollars; he gave his daughter some insurance stock and, saving what he had bequeathed to the stepson, all the stock in which, under the will, the wife was to have for life. There were no funds to satisfy the money legacies and the widow elected to take against the will. Both bequests were specific and possession was accelerated by the election: In re Klenke's Estate, 210 Pa. 575, 60 Atl. 167.

A woman provided by will that her son be allowed to live on a farm named instead of receiving the income of it, the farm to be sold after his death and the proceeds to go to other certain beneficiaries. The son took a specific legacy: In re Martin, 25 R. I. 1, 54 Atl. 589. In Manlove v. Gant, 2 Tenn. Ch. App. 410, the gifts were of rents yet to accrue, the proceeds of the sale of a storehouse, less the mortgage to be paid on it, and what might be left of money in the bank after paying funeral expenses, etc., and doctor's bills. The legacies were specific.

In closing this branch of the subject it is not out of place, perhaps, to quote at some little length from a Massachusetts case where the characteristics of a specific bequest are put forth very clearly. The case was one of a bequest of a certain mortgage deed and the note mentioned in the mortgage to a person in trust to hold the same on certain trusts, collect when payable the debt secured by the instruments, and sell the same whenever he should deem best, and invest the proceeds. Devons, J., said, among other things: "When the intent is to bequeath a certain sum and the circumstances that it is then out on mortgage or any other security is incidental merely, and does not constitute an ingredient in the gift, the legacy is general: Le Grice v. Finch, 3 Mer. 50. But if the gift be of the sum due upon a mortgage of particular premises, or upon a certain note described, the legacy is specific: Sidebotham v. Watson, 11 Hare, 170; Gillaume v. Adderley, 15 Ves. 384; Chaworth v. Beech, 4 Ves. 555; Innes v. Johnson, 4 Ves. 568; Giddings v. Seward, 16 N. Y. 365. So if the gift is of the proceeds of a certain mortgage or all the money due on the bond of A. B. or all the money standing to the testator's credit in a particular bank, such legacy is specific: Giddings v. Seward, 16 N. Y. 365; Stout v. Hart, 2 Halst. 414; Towle v. Swasey, 106 Mass. 100. When the bequest is not of the sum of money due on a particular security, but of a particular security described, the gift is not less

specific, for nothing will fulfill the terms of the bequest but the thing itself. The legacy we are now considering was of the mortgage deed, note and debt. The fact that the testatrix mentions the amount due from the promisor is for its convenient identification only. This does not constitute any ingredient in the gift. It would belong to the legatee if it should have been reduced by payment, but there would not be any claim, on account of such reduction, against the general estate. As long as it can be identified, the legatee may have it; but he receives it in the condition in which it is when the gift takes effect by the death of the testatrix. The security was the essential thing. If the money due thereon had been collected and invested in a new form the legacy would have been adeemed, as that which was given would have ceased to exist": Farnum v. Bascom, 122 Mass. 282.

When a bequest is held to be specific, rather than demonstrative or general, the fact may be of advantage to the legatee or otherwise according to circumstances.

"The rules as to specific legacies are known; in several things they are preferred to pecuniary legacies, in others not. They are entitled to this advantage, that if there is not a penny for the pecuniary, a specific legatee shall take the whole, if that exists": Drinkwater v. Falconer, 2 Ves. Sr. 623. In the case of Masters v. Masters, 1 P. Wms. 421, it was admitted that both the real and personal estate of the testatrix were deficient in value to pay the legacies and annuities given by the will. "It was decreed by the master of the rolls that, the personal estate not being sufficient to pay the legacies and the real estate being liable to the legacies by the will, the estate should be so marshaled that as far as possible the whole will might take effect and all the legacies be paid. And therefore that the legatees should be paid out of the real estate, and if that should be deficient they must be paid out of the personal estate; and, there being admitted to be a deficiency that the land should be forthwith sold to prevent a greater deficiency, but that the specific legacies must be all paid, and not abate in proportion."

And in Blaney v. Blaney, 55 Mass. (1 Cush.) 107, it was said: "By the established rule of marshaling assets, specific devises and legacies are not to be taken for payment of the testator's debts until the general devises and legacies are exhausted." And in Cooch's Exr. v. Cooch's Admr., 5 Houst. 540, 1 Am. St. Rep. 161. "Every testator is presumed to know the law with respect to the liability of his estate for his debts, and consequently to make disposition of it in accordance with such knowledge. Therefore it is that when a testator even uses such sweeping and apparently conclusive words in disposing of his personalty as 'all my personal estate,' the law still holds that he only meant such portion of it as should be left after taking from it all that it was liable to, either as matter of legal responsibility for debts, funeral expenses and charges of administration, or on account

of some further deduction which the provisions of his will require—for example, a specific legacy."

In Drinkwater v. Falconer, 2 Ves. Sr. 623, the court, after saying as above quoted, "If there is not a penny for the pecuniary, a specific legatee shall take the whole," adds: "But, on the other hand, if it [the thing bequeathed] does not appear on the death of the testator it is gone, and the general assets cannot be resorted to." And in Lord Eldon's observation in Howe v. Lord Dartmouth, 7 Ves. 137: "The question must be, Did he mean to dispose of what he had at the date of the will, or of that which he should have at his death? If he meant the former, then every part of that identical personal estate which is disposed of between the date of the will and the death is a legacy adeemed." An illustration is found in the case of a specific legacy of money due on a note. After making her will the testatrix received payment of the money and deposited the latter with a banker with whom she had no other funds, and it so remained, all but ten pounds which she drew out, until her death. It was held an ademption. Sir William Grant said: "The principle of ademption by receiving the thing given is certainly that the thing given no longer exists; for if after the receipt of it, it could be demanded, that would be counting it into a pecuniary, instead of a specific, legacy. It is said this is pecuniary, as it is a bequest of the money to be received. But that is the case of every bequest of a debt. If anything could be made of the circumstance of placing the money with these bankers, it is counter-balanced by the other circumstance that she drew out a part of that money. That is treating it as her own. If she meant to appropriate it and consider it as a legacy still standing and binding upon her estate, she ought not to have touched it. This is not so much to be considered as a partial ademption as an evidence of her having deposited there to be at her own command": Fryer v. Morris, 9 Ves. 360.

A grandchild was to have a certain sum of money and two hundred shares of a named stock, and the testator's wife was given all the rest of the property. When the will was made the testator owned shares of stock in various companies and over two hundred shares of this named stock, but at his death he held less than two hundred shares of this stock. The bequest was not general, but specific, and the legatee was entitled to only the number of shares the testator had at his death: New Albany Trust Co. v. Powell, 29 Ind. App. 494, 64 N. E. 640.

A testator made a will before the settlement of his father's estate and bequeathed to certain persons sums to which he would be entitled under his father's will. He left the rest of his estate to other persons. The father's estate, upon settlement, did not produce, as the son's part, the full amount of the sums bequeathed, as above, and the legatees, applying to have the deficit made good from the rest of the son's estate, were denied, the ground being that the legacies

were specific and partially adeemed: Gelbach v. Shively, 67 Md. 498, 10 Atl. 247.

A testatrix provided that a sum of hers held by her brother be devoted to the payment of the funeral expenses and other bills and gave a life estate in what might be left of it to a person named. She further provided that on the death of that person six hundred dollars of the sum should go to a certain other person. The sum was, after the making of the will, received by testatrix from her brother and became mixed with her other funds. The bequest was specific and was adeemed by a failure of the fund: In re Stilpen, 100 Me. 146, 60 Atl. 888, 4 Ann. Cas. 158. A will gave four hundred dollars to the testator's nephew, owner of land on which the testator held a mortgage for that amount, and the direction to the executor was that the gift was to be effected by his assigning and transferring the mortgage to the mortgagor; but the mortgagor paid the mortgage to the mortgagee and after the latter's death it was held that the nephew was not entitled to four hundred dollars in money: Wheeler v. Wood, 104 Mich. 414, 62 N. W. 577. Testatrix when making her will had twenty shares of the stock of a certain bank and of that stock gave by the will ten shares to each of two persons. The bequest was held to be of the particular shares owned by her, and not twenty shares generally, and as she had disposed of ten shares after making the will, the legatees took only five shares each. It was a partial ademption: Drake v. True, 72 N. H. 322, 56 Atl. 749.

A will gave to the executors "a certain bond and mortgage for seven thousand dollars, the present amount of principal due, and which I hold against J." The executors were to hold in trust, to pay to A. the interest during his life and afterward to reduce the obligations into cash, and divide and distribute according to further testamentary directions. However, J. paid up during the testator's lifetime and the money remained on deposit with a banker. The bequest was specific, and adeemed: Abernethy v. Catlin, 2 Dem. Sur. (N. Y.) 341.

There was a bequest to a sister of all the testator's personal estate and a devise to her for life of the farm he occupied, with a provision that when she died the farm was to be sold and the product of the sale distributed among their nephews. The farm was sold before the testator's death, however, and a mortgage taken for the price, which mortgage was, when the testator died, only partly paid up. The bequest to the nephews was decided to be specific and adeemed: Sharp v. McPherson, 10 Ohio C. C. 181, 3 Ohio Dec. 468.

A man devised a tract of land to his son subject to a charge of six hundred dollars for the benefit of the children of another son. Half of this sum was to be paid in one year after the testator's death and the other half in two. But after making his will the testator sold the land to a third son, the consideration being partly in cash and partly in deferred payments which did not mature until after the death of the testator. As the charge under the devise was the

only source contemplated of payment of the amount charged, this amount was held to be a specific bequest which had been, of course, adeemed: Walls v. Stewart, 16 Pa. 275. A bequest of promissory notes is specific and subject to be reduced by payments made between the execution of the will and the death of the testator: In re Martin, 25 R. I. 1, 54 Atl. 589.

The ademption of legacies is discussed at length in the note to Miller v. Malone, 95 Am. St. Rep. 342.

Lord Hardwicke said in Ellis v. Walker, Amb. 309: "The court leans against considering legacies as specific, because of the consequences." To the same effect, see Chaworth v. Beach, 4 Ves. 555; Innes v. Johnson, 4 Ves. 568; Kirby v. Potter, 4 Ves. 748; Raymond v. Broadbelt, 5 Ves. 199; Barton v. Cooke, 5 Ves. 461; Sibley v. Perry, 7 Ves. 502; Webster v. Hale, 8 Ves. 410; Deane v. Test, 9 Ves. 146; Wilton v. Brownsmith, 9 Ves. 180; Fryer v. Morris, 9 Ves. 360; Smith v. Pybus, 9 Ves. 566; Lambert v. Lambert, 11 Ves. 607; Guillaume v. Adderley, 15 Ves. 384; Apreece v. Apreece, 1 Vern. & B. 364. Among American decisions to the same effect are Briggs v. Hosford, 22 Pick. (39 Mass.) 288; Dexter v. Phillips, 121 Mass. 178, 23 Am. Rep. 261; Appeal of Balliet, 14 Pa. 451.

What these consequences are we have seen, but the matter is given emphasis in the following extract from a decision in a Maryland case: "In determining this as well as all other questions involving the construction of a will, it is admitted that the intention of the testator must prevail, but inasmuch as specific legatees are not liable to contribution in case of a deficiency of assets, and inasmuch as the legacy fails entirely if the testator parts with the property or thing specifically bequeathed, courts lean against construing a legacy to be specific, and have gone so far as to say that in no case ought a will to be so construed unless the language imperatively requires it. And accordingly we find Lord Eldon saying that, according to well-settled rules of construction, he was obliged to decide a legacy to be general although according to his private opinion the testator meant it to be specific": Dryden v. Owings, 49 Md. 356. Among other American cases bearing this sentiment are Morton v. Murrell, 68 Ga. 141; Requet v. Eldridge, 118 Ind. 147, 20 N. E. 733; Malone v. Mooring, 40 Miss. 247; Wallace v. Wallace, 23 N. H. 149; Perry v. Maxwell, 17 N. C. 488; Balliet's Appeal, 14 Pa. 451.

"A demonstrative legacy partakes of the nature of both a general and specific legacy. It is a gift of money or other property charged on a particular fund in such a way as not to amount to a gift of the corpus of the fund or to evince an intent to relieve the general estate from liability in case the fund fails. A specific bequest is liable to ademption, but such is not true of a general or a demonstrative legacy": Nusly v. Curtiss, 36 Colo. 464, 118 Am. St. Rep. 113, 10 Ann. Cas. 1134, 7 L. R. A. (N. S.) 592, 85 Pac. 846. "The distinction between a specific and a demonstrative legacy involves not merely a

technical question depending for its solution solely upon the precise language of the bequest, but a substantial inquiry respecting the intention of the testator as shown by the terms of the particular legacy, examined in connection with all the other provisions of the will. A specific legacy is a bequest of a specific article or particular fund which can be distinguished from all the rest of the testator's estate of the same kind, while a general legacy is payable out of the general assets of the estate": In re Stilpen, 100 Me. 146, 4 Ann. Cas. 158, 60 Atl. 888. In the same opinion it is said that a demonstrative legacy partakes of the nature of a specific one, to be sure, by designating the fund out of which it is to come, but that there is a vital distinction in respect of the result in case of the failure of that fund. In such circumstances a specific legacy is adeemed or lost by the extinguishment of the specific thing or failure of the particular fund, while a demonstrative legacy is still alive after such a failure, being payable then out of the general assets. To the same effect see Morriss v. Garland's Admr., 78 Va. 215.

This, in fact, is the bequest of quantity that Lord Hardwicke had reference to in the quotation above from his decision in Purse v. Snaplin, 1 Atk. 414. The quality of the gift is intermediate between that of a specific and that of a general bequest: Harrison v. Denny, 113 Md. 509, 77 Atl. 837. As was said in Balliet's Appeal, 14 Pa. 45: "The distinction between a specific and a pecuniary legacy and a specific and a demonstrative legacy is sometimes very nice."

A testator made a gift of a named sum to each of two nieces, stating it to be "part of the proceeds of" certain property mentioned—ground rents, insurance, etc. These were demonstrative bequests, and if such proceeds proved insufficient to satisfy them, the legatees had resort to the other property of the estate: Harrison v. Denny, 113 Md. 509, 77 Atl. 837. A testator provided that his widow, if outliving his mother, should take the income of property he named (which income his father by will had given to the mother for life, testator being given by the same will testamentary disposal of the principal) until his, testator's eldest child, should reach full age, at which time, if the widow still lived, his executors should "set apart out of the said property" a fund of one hundred thousand dollars for the child's benefit. Similar provision was made in respect of each of his children him surviving, the widow to continue, during life, to enjoy what was left after each setting apart. Three children were living when the testator died, and all reached maturity, testator's widow still surviving but his mother being dead. The property subjected to these dispositions amounted to only one hundred and twenty-five thousand dollars, and the testator had had the disposal, under his father's will, of two hundred and sixty-five thousand more, but had acquired no independent means. The children were held to have demonstrative bequests and could look to the general assets for having them satisfied: Bradford v. Brinley, 145 Mass. 81, 13 N. E. 1.

A bequest was, under the will, payable out of personal property on hand after the death of the wife of the testator and before the personal property should be divided. It was demonstrative rather than specific: Hibler v. Hibler, 104 Mich. 274, 62 N. W. 361. A will provided for a fund from which a certain income was to be derived for the testator's widow, this income to be paid her yearly, securities enough to produce which should be selected. This was a "general" or "demonstrative" bequest, the court said, and the full amount must be made up out of the assets generally: Merriam v. Merriam, 80 Minn. 254, 83 N. W. 162. The selection by an executor, empowered by a will to select securities from which named income was to be derived for a beneficiary, is not so final as that the income fails with the securities selected. On such failure of the selected securities resort would be to the corpus of the estate, this being a demonstrative bequest: Eggleston v. Merriam, 83 Minn. 98, 85 N. W. 937, 86 N. W. 444.

A gift in a will read: "To the three daughters of T. the sum of four thousand dollars each, to be secured to them in the best manner possible, and the interest accruing thereon to be paid to T. for their support and education; moreover, till this donation be secured, to pay T. the sum of three hundred dollars per annum; this donation to be paid to each when of age or married." Here was not a demonstrative but a general pecuniary legacy, a charge primarily upon the whole estate: Bodley v. McKinney, 9 Smedes & M. (17 Miss.) 339. A testator's wife was to have "the sum of eight thousand dollars invested in stocks, the interest to be paid to her during her life." The bequest was demonstrative: Johnson v. Conover, 54 N. J. Eq. 333, 35 Atl. 291.

By a will a trustee (who was also an executor and the residuary legatee) was given certain sums "in bonds," of corporations named, to be reckoned at their face. At the making of the will the testator owned of each kind of the bonds enough to cover all the bequests. A later clause of the will provided that if the estate should fail to show the whole number of the bonds, the trustee need not furnish them, but take just what there were. If the bequest had ever a demonstrative aspect, that last clause took it away; it was specific: Blair v. Scribner, 65 N. J. Eq. 498, 57 Atl. 318. And see same case in 67 N. J. Eq. 583, 60 Atl. 211. There was this language in a will: "And my said wife having now in her possession the sum of eight hundred and fifty dollars in money, I direct and request my said executors to pay her the sum of one hundred and fifty dollars more, so as to make her the sum of one thousand dollars. My meaning and intention is to give her the sum of one thousand dollars." The court said the bequest of the one thousand dollars was general rather than specific, but that that of the eight hundred and fifty was demonstrative, or specific in so far as to require it to be paid out of the fund named unless such had failed: Enders v. Enders, 2 Barb. 362.

The "sum of twelve hundred dollars and interest on the same, contained in a bond and mortgage," was bequeathed under a will which,

by a further clause, in effect made the legatee such only for life, with remainder over. The bequest was held to be demonstrative: Giddings v. Seward, 16 N. Y. 365. The widow was to have durante viduitate, provided at the testator's death issue of the marriage should be living, an annuity of eight thousand dollars to be paid "out of the income of my estate." The will then provided that in default of such living issue she should have an annuity of seven thousand dollars, the sole provision made for her, and left "the residue of the income" to go to a brother and sisters of the testator for their lives with remainder to their children on the death or marriage of the widow. The annuity of seven thousand dollars was held to be a demonstrative bequest, to be paid out of the principal of the estate if the income from the latter was deficient; and this, although when making his will the testator thought, according to the evidence, that his estate would produce an ample income after payment of the larger annuity: Pierrepont v. Edwards, 25 N. W. 128.

A testatrix made certain general and specific bequests and provided then that F. be paid fifty dollars a month, during his life, out of the rents and income of the estate. She instructed, next, her executors to keep down the interest on her realty, pay assessments on it and maintain it in repair. The personal property was not adequate fully to satisfy the general legacies. F.'s bequest was held to be demonstrative: Florence v. Sands, 4 Redf. Sur. (N. Y.) 206.

A devisee was directed, as to a named sum on deposit in his name, to pay it to another person. Here, it was held, was a specific rather than a demonstrative bequest, and if the testator after making the will used the deposit, it was not a thing to be made good to the legatee after the testator's death: Crawford v. McCarthy, 159 N. Y. 514, 54 N. E. 277. When the terms of a testamentary gift of money are plain and conclusive, showing an intention that the legatee shall certainly receive the amount, the gift is demonstrative: Watrous v. Smith, 7 Hun, 544; M. E. Church v. Hebard, 51 N. Y. Supp. 546.

Testatrix gave a house and lot to her infant children and directed that of the money in bank as much as necessary be used to pay off the mortgage on the house, all as soon as possible after her death. This was a demonstrative bequest, and if the money in bank did not suffice to carry out the direction and there was no personalty left in the estate after payment of administration expenses, resort must be had to the balance: In re Bedford, 67 Misc. Rep. 38, 124 N. Y. Supp. 619. A will contained this provision: "I give unto my youngest child, W. H. W., the sum of three thousand dollars, to be due and paid when he arrives to twenty-one years of age, out of the proceeds of the sale of my lands." It was a demonstrative bequest: Croom v. Whitfield, 45 N. C. 143.

An estate was by will divided into shares, and of these two, it was directed, were to be in negro property, which should be designated by the executors. These were demonstrative bequests: Johnson v.

Osborne, 62 N. C. 59. A testator made certain bequests of four thousand dollars each to be paid in any of his stocks, bonds, notes or other evidences of debt at their market value. If such were inadequate for the purpose, the deficit was to be made good in money. The bequests were demonstrative: Trustees of Baptist Female University v. Borden, 132 N. C. 476, 44 S. E. 47, 1007. A bequest of a lump sum payable in shares of enumerated stocks at figures stated is demonstrative: Rose v. Warner, 17 Ohio C. C. 342, 9 Ohio Dec. 536. A legacy given, reference being made in the will to a stated fund so as merely to point out a convenient mode of paying it, is demonstrative: Walls v. Stewart, 16 Pa. 275.

A man gave realty to his son and bequeathed to his daughter three hundred dollars to be paid a year after his death by the son out of the profits of the realty so given the latter. Afterward he contracted with the son to sell him the realty, delivered the deed, but was paid no money or obligations looking to payment thereafter, though it was known the contemplated consideration was the son's supporting his father and mother and paying three hundred dollars to his sister. The bequest to the latter was held to be demonstrative: Appeal of Welch, 28 Pa. 363. A bequest of money to be paid by a debtor of the testator would be demonstrative: In re Hoppel's Estate, 5 Phila. 216. "A demonstrative legacy is a bequest of a certain sum to be paid out of a particular fund": Appeal of Armstrong, 63 Pa. 312.

There was a bequest of money on deposit in a named savings bank and a subsequent clause in the will bequeathing to another person "all I have deposited in banks not otherwise disposed of." At the making of the will testatrix had money in the savings bank named, but that bank became insolvent shortly before her death. The bequest was demonstrative, to be paid by the savings bank if possible, but if not the legatee could resort for payment to the general assets: Bowen v. Dorrence, 12 R. I. 269. A will directed the executors to collect insurance policies and from the receipts therefrom to pay certain bequests. There was no intent expressed that the general assets should be free from resort by the legatee in case of any inadequacy of the fund appointed to pay the bequest, and so the latter was held to be demonstrative: White v. White, 73 S. C. 261, 53 S. E. 371.

There was a bequest to a daughter for life of five hundred and forty dollars a year, interest on the purchase money on lands the testator had sold. The bequest was demonstrative: Corbin v. Mills' Exrs., 19 Gratt. 438. Testator directed certain lands to be sold and his personal property also to pay debts. He bequeathed seven hundred dollars to one son, which was to be his entire portion. The homestead was to go to another son named also as executor—who was to farm it during the widowhood of his mother, pay one-fourth of the proceeds to her and the remainder to the six heirs. The homestead was sold after the widow's death and the proceeds of the property other than it were insufficient to pay the debts and the seven

hundred dollar legacy. It was held that this was a general legacy while the parts directed to go to the six heirs were demonstrative, and these legatees could not be called upon by the other: Myers v. Myers, 88 Va. 131, 13 S. E. 346. A bequest of bonds of a named description, when the testator at the making of the will has of such a large excess over those bequeathed, is not adeemed by a subsequent payment of the bonds during the testator's lifetime. The bequest is demonstrative: Ives v. Canby, 48 Fed. 718. To the same effect, see Boykin v. Boykin, 21 S. C. 513, and Wheeler v. Hartshorn, 40 Wis. 83.

From a perusal of these authorities it will be seen how true is the expression above quoted from Ballict's Appeal, 14 Pa. 451, to the effect that the distinction between a demonstrative bequest and a specific one, on the one side, and a general pecuniary one on the other, is very nice. "Ordinarily, a legacy of a sum of money is a general legacy, but when a particular sum is given with reference to a particular fund for payment, such legacy is denominated in law a demonstrative legacy": Gelbach v. Shively, 67 Md. 498, 10 Atl. 217. In that case the court goes on to speak of what it is that is to be looked to really in order to determine whether it is the one thing or the other, thus: "The authorities seem to be clear in holding that whether a legacy is to be treated as a demonstrative legacy or as one dependent exclusively upon a particular fund for payment is a question of construction, to be determined according to what may appear to have been the general intention of the testator: Creed v. Creed, 11 Clark & F. 509. For although the personal estate of the testator is the primary fund for the payment of legacies generally, particular legacies may be so provided for as to be a charge upon a particular fund or estate exclusively. As was said by the lord chancellor in Faville v. Blacket, 1 P. Wms. 779, 'It is possible for a legacy to be charged in such manner upon a certain fund as that upon its failing the legacy shall be lost'": Bebach v. Shively, 67 Md. 498, 10 Atl. 247. "Whether all the cases can be reconciled or not, they all proceed upon the principle that whether a legacy is demonstrative or specific must be decided by the intent of the testator as it appears from the will; and that when a legacy is held to be demonstrative, a general intent is shown to have it paid without reference to the fund on which it is primarily charged": Stevens v. Fisher, 144 Mass. 114, 10 N. E. 803. To the same effect, see Davis v. Close, 104 Iowa, 261, 73 N. W. 600, and Davis v. Crandall, 101 N. Y. 311, 4 N. E. 721.

In General.—"A legacy is said to be general when it is not answered by any particular portion of, or article belonging to, the estate, the delivery of which alone will fulfill the intent of the testator": Davis v. Close, 104 Iowa, 261, 73 N. W. 600; In re Parson's Estate (Iowa), 129 N. W. 955; and see Gifft v. Porter, 8 N. Y. 516, to the same general effect. "A legacy is a 'general legacy,' and not specific where so given as not to amount to a bequest of a particular thing or money distinguished from all others of the same kind": In re Bar-

ton's Estate, 64 Misc. Rep. 242, 118 N. Y. Supp. 1087. It is said in Balliet's Appeal, 14 Pa. 451, that it is a legacy of quantity. In Rhode Island it is said that gifts of stated sums of money, without specifying any distinctive money in contradistinction from any other money of like amount, are general legacies: In re Martin, 25 R. I. 1, 54 Atl. 587. It was well said in Morton v. Murrell, 68 Ga. 141, that if a will directed bequest to be yielded out of the estate and mentioned no special part of the estate in that connection, to hold the bequest specific might be to frustrate the whole purpose of the testator clearly apparent from the instrument.

A bequest of "five thousand dollars in railroad bonds" is general: Gilmer's Legatees v. Gilmer's Exrs., 42 Ala. 9. And if one should bequeath all his personal estate, excepting specifically certain things therefrom, that would be a general bequest: Kelly v. Richardson, 100 Ala. 584, 13 South. 785. So, too, would be a legacy expressed thus: "I bequeath all my personal estate to my brother": In re Woodworth's Estate, 31 Cal. 595. In another California case there was a gift to the testator's five sons of the remaining one-half of all the real property the testator had acquired since marrying his wife then living, and all the residue of his personal property after payment of the legacies. This was a general bequest: In re Ratto's Estate, 149 Cal. 552, 86 Pac. 1107. That was, of course, in the nature of a residuary legacy. Such cannot be treated as specific, but from their general nature must be regarded as general: Fairer v. Park, L. R. 3 Ch. D. 309. And this, even though some of its particulars are enumerated in the will: Pickup v. Atkinson, 4 Hare, 624. But a bequest of the remainder of a particular thing or fund, after the payment of other legacies, or of all one's estate in a particular locality, may be specific so long as the identity of the thing or fund is not destroyed: Nisbett v. Murray, 5 Ves. 149.

The rule in England is that way, and in this country the courts have not departed very much from the English doctrine in respect to these dispositions. Two testators by a joint will devised certain real estate to a nephew and two nieces on certain conditions and with certain limitations. The residuary clause provided that the residuary estate be divided equally between the nephews and nieces "or their children, on the same conditions, by the same rule and in the same manner as are detailed in the foregoing bequests." What really these last two words had reference to was the devises of the real estate, and the residuum was made up mostly of government bonds, money in bank, etc. The bequest of the residuum was held to be general: Hill v. Harding, 92 Ky. 76, 17 S. W. 199, 437. A testator bequeathed more stock than he owned when making the will and much more than he died possessed of, and made a residuary bequest of "all the rest, residue and remainder of my estate." The legacies of stock were general and the executor ordered by the court to purchase stock with the general funds so as to make up the absent shares: Slade v.

Talbot, 182 Mass. 256, 94 Am. St. Rep. 653, 65 N. E. 374. But where there was a devise and bequest to one person of described real estate of testatrix, her household furniture and all the rest of her property, the gifts of the realty and the household furniture were held to be specific, notwithstanding the general residuary clause: In re Corby's Estate, 154 Mich. 353, 117 N. W. 906.

A testator bequeathed domestic livestock to his daughters and charged lands, which he devised to his sons, with the furnishing of hay and pasturage for these livestock. He owned no such livestock, and so the bequest was not specific, but it was held the daughters might have the hay and pasturage for any livestock, within the number and kind mentioned, they might own during life: Kingsland v. Kingsland, 60 N. J. Eq. 65, 47 Atl. 69. There was a bequest to a daughter of an income for life from certain stock, with directions that if at the testator's death his estate was deficient as to any of the stocks particularly described, other similar stocks were to be purchased for the purpose with the funds of the estate. The daughter's legacy was general or pecuniary: Langdon v. Astor's Exrs., 16 N. Y. 9. Plaintiff was one of several legatees under a will in which the testator had enumerated securities he owned and their amount in money, which amount was to cover the bequests. The residue of his personalty, "as shown in the foregoing statement," the testator gave to his wife. He mentioned a sum due him which, when collected, was to be the subject of further bequests—one to the plaintiff. The remainder of all his personal estate he gave to his wife. The plaintiff's bequest was general: Glover v. Glover, 136 N. Y. 665, 33 N. E. 335. The testator directed the reserving by his executors from his personal estate of a fund sufficient to pay certain life annuities, and on the deaths of the beneficiaries to dispose of the fund as residuary estate. The annuities were general bequests: Turner v. Mather, 179 N. Y. 581, 72 N. E. 1152.

A bequest of a negro, with a description of the sort intended, when the executor was directed to purchase such a one rather than divide families, was a general bequest: White v. Beattie, 16 N. C. 87. So, also, was a bequest to the testator's wife of "one year's provisions"; Everitt v. Lane, 37 N. C. 548. There was a devise to a wife of particular real estate, also all the testator's "household goods and furniture, moneys, bonds, mortgages, outstanding debts due and owing to me [him], and all other my [his] personal estate of what nature or kind soever." The bequest of the personal property was general: In re Walker's Estate, 3 Rawle, 229. A bequest charged with the payment of debts is general: In re Ingersoll's Estate, 3 Pa. Dist. Rep. 339.

A testatrix gave six hundred dollars in stock described to one person and two thousand dollars in similar stock to another. After making the will she exchanged the described stock owned by her for stock of another sort. The bequests were general: In re Snyder's Estate,

217 Pa. 71, 118 Am. St. Rep. 900, 10 Ann. Cas. 488, 11 L. R. A. (N. S.) 49, 66 Atl. 157.

A bequest of the income from a twelve thousand dollar mortgage was made to two persons during life, and, at their deaths, bequests to others to the total amount of twelve thousand dollars. No direction was made that these should come out of the mortgage. The bequests were general: Teel v. Hilton, 21 R. I. 227, 42 Atl. 1111. A bequest to a son was of "six negroes to be designated by my executor, of a fair average value with my other negroes [including two named by the testator as being then in his possession] to him and his heirs forever." The bequest was general: Dawson v. Dawson, Speer Eq. 475. There was a devise to a wife, during widowhood and until the maturity of the youngest child, of all the testator's property, including his interest in a partnership; if the widow should remarry or the youngest child reach maturity, then all the property was to be divided equally among the wife and the children then living. The question was as to the partnership interest, and the holding was that the bequest of that was not specific: Stehn v. Hayssen, 124 Wis. 583, 102 N. W. 1074.

Pecuniary Legacies.—"The general rule of law as to pecuniary legacies (in the absence of any sufficient indication of a contrary intention) is that they are payable by the personal legal representatives of the testator (in whom the whole personal estate vests by law) out of the personal estate not specifically bequeathed. The presumption is that the testator intends them to be so paid. Unless charged upon it by the will, they are not payable out of the real estate": Robertson v. Broadbent, 8 App. Cas. 812. A bequest of six hundred dollars in cash to several persons, each, is, it is almost unnecessary to say, a general bequest: Kelly v. Richardson, 100 Ala. 584, 13 South. 785. So would be similar bequests when the testator makes them on the expressed hypothesis of his having at death sufficient personal property: In re Corby's Estate, 154 Mich. 353, 117 N. W. 906.

In Vaiden v. Hawkins, 59 Miss. 406, it is said in effect that to give a specific character to a pecuniary legacy the language of the testator must go very clearly to that effect; for instance, the oft-mentioned case of money in a bag: Lawson v. Stitch, 1 Atk. 508. The bequest of a sum of money without mention of any particular fund for it to come out of is to be looked upon as a general bequest, even though in the residuary clause it is referred to as specific: Parker's Exrs. v. Moore, 25 N. J. Eq. 228. A man bequeathed a sum of money to each of his children "to be kept in gold and silver" and paid to the legatees as they arrived each at maturity, the money not to be lent meantime nor used. The bequests were general: Mathis v. Mathis, 18 N. J. L. 59.

A will recited that the testatrix had "two thousand dollars out at interest at seven per cent," and directed that "said sum shall be kept invested" until a time stated, and then divided between two named

persons. These were general bequests: Langstreth v. Golding, 41 N. J. Eq. 49, 3 Atl. 151. An entire estate was, under the will, to be reduced to cash, and of this a certain sum was to be invested and the interest given to the wife of the testator, there being no express reference in the will to this being in lieu of dower. Another sum was to be invested and the interest paid to an adopted daughter. The gifts were general bequests: In re Williams, 1 Redf. Sur. (N. Y.) 208. A bequest by a woman to her husband of the use of five thousand dollars and as much of the principal as might be necessary for his support is general: Scofield v. Adams, 12 Hun, 366. The executors under a will were directed to invest a sum such as would bring in a clear one thousand dollars annually, and out of the investment to pay the wife of the testator one thousand dollars during widowhood. It was a general bequest: Haviland v. Coeks, 6 Dem. Sur. 4. A testator made his wife executrix and gave her fifty thousand dollars, "which may be invested in bank stock and in bonds." The bequest was general: In re Hodgman's Estate, 140 N. Y. 421, 35 N. E. 660. There were bequests of certain sums "in government bonds." When making the will and until his death the testator owned such bonds, the par value of them all being equal to the bequests so made; but at his death the bonds were at a premium. The bequests were general and the legatees entitled to so much money, rather than bonds: In re Van Vliet, 5 Misc. Rep. 169, 25 N. Y. Supp. 722. The face of a bond was to be collected and divided among legatees named in the will. After making this the testator took by assignment from the obligors of the bond, in place of the latter, another bond for a like amount and this was found among his assets. The bequest was general: Doughty v. Stillwell, 1 Bradf. 300.

Bequests to two of the sons of the testator, absolutely, one to have two hundred and fifty dollars and the other four hundred. A third son owed the testator one thousand dollars secured by mortgage, wherefore this son was to pay the legacies to his brothers out of the mortgage debt, retaining the balance due by way of a bequest from the father to him. The bequests to the first two sons were general, and the estate liable for them: Newton v. Stanley, 28 N. Y. 61. A bequest of a specified sum "or the value thereof in property" is general: Fagan v. Jones, 22 N. C. 69.

If a person is given by will a stated sum to be paid "in good notes" at his option, the person has a general legacy; so too if the bequest is of a stated sum "in notes to be paid by the executor" as soon as may be convenient after the testator's death: Perry v. Maxwell, 17 N. E. 488.

In Cryder's Appeal, 11 Pa. 72, the will provided first for the payment of the testator's debts, next for the sale of one of his two farms—with directions as to the price and how and when this was to be paid, and for the sale of the other farm for the best price obtainable. Then came bequests to some of his children, to the pay-

ment of which the produce of these sales was to be applied—that of the sale of the first farm as far as it would go and that of the second for the balance. Then came devises to other children in fee. Finally, there was a direction as to the order of payment of the "pecuniary legacies" payable from the product of the sale of the first-mentioned farm. The executor exhausted the personalty and the products of the sale of the two farms in paying the debts, and there was no fund for satisfying the legatees. The bequests were held, however, not to be general but specific. There was a devise of one of the plantations of the testator to one person, and of another to another person, and to the latter in addition so much money as with the plantation he took would make the two bequests even. These were, it was held, general bequests: Jenkins v. Hanahan, Cheves Eq. 129.

A quasi pecuniary legacy, and hence general, was that of twenty negroes, so decided in Warren v. Wigfall, 3 Desaus. 47. A testatrix, as a feme sole, made a will, whereby a missionary society was given eight thousand dollars, and went on to say that if that sum proved to be more than half her estate, the society was to have but one half; a church society was given the rest of what she had, real and personal. The missionary society took a general bequest: In re Carey's Estate, 49 Vt. 236, 24 Am. Rep. 133.

Securities Given in Terms of Money.—The effect in a bequest of the words, "I give to my friend [naming him] ten thousand dollars, in notes or in Confederate states bonds, at the option of my executors hereinafter named," is to make it general: Harper v. Bibb, 47 Ala. 547. "I give to my brother twenty thousand dollars in Confederate bonds," is a general bequest: Gilmer's Legatees v. Gilmer's Exrs., 42 Ala. 9. A will directed "that the income from six thousand dollars in bonds of the United States shall be set apart and appropriated," etc. The testator owned twelve thousand dollars in such bonds at the time, and by the will disposed of twenty-one thousand altogether. The bequest was general: Capron v. Capron, 6 Mackay, 340. Under a will "notes to the amount of sixteen hundred dollars, on the N. K. & G. W. C. security," were devoted to buying for a woman and her children a plantation, this to be sold again and the proceeds distributed when the eldest child came of age. The bequest was general: Smith v. Smith's Exrs., 23 Ga. 21. Where a certain number of shares of the stock of a named corporation was bequeathed without any reference to particular shares, the bequest was general: Palmer v. Palmer's Estate, 106 Me. 25, 19 Ann. Cas. 1184, 75 Atl. 130.

A will provided for bequests of six hundred dollars each to four persons. "This amount is in notes," it went on, "such as the executrix of my will may turn out to them." Testator's wife was given the residue of the estate and named executrix. It was held that the language here did not contemplate specific bequests of notes, but indicated rather a fund; that the legatees were not restricted to notes

good or bad, and that if the fund mentioned failed to meet the amount of the bequest, resort should be had to the estate generally: Frank v. Frank, 71 Iowa, 646, 33 N. W. 153. Bequests were of stated amounts "in United States government bonds" to each of the two daughters of the testator. The latter left when he died such bonds amounting on their faces to the total of the bequests. The bequests were general: Evans v. Hunter, 86 Iowa, 413, 41 Am. St. Rep. 503, 17 L. R. A. 308, 53 N. W. 277.

At both the making of the will and his death the testator owned just eight state of Missouri bonds of the par value of one thousand dollars each; the words of the bequest were, "I give and bequeath to O. eight thousand dollars in state of Missouri bonds." The bequest was general: Dryden v. Owings, 49 Md. 356. When making his will the testator owned one hundred and eighty shares of the stock of a certain bank. He bequeathed "sixty shares of bank stock in the," etc., naming the bank, to each of two daughters, and afterward sold the stock. The bequests were general: Johnson v. Goss, 128 Mass. 433. One bequeathed particular sums in bonds and mortgages, when he did not have at the time of making the will securities of the sorts named enough to satisfy the bequests, and did not make any direction for selecting them out of his estate. The bequests were general: Blundell v. Pope (N. J.), 21 Atl. 456. A direction in a will to devote a named sum of money to buying a particular, mortgage would not make the contemplated bequest specific: Moore's Exr. v. Moore, 50 N. J. Eq. 554, 25 Atl. 403.

If one makes a bequest of a stated number of shares of a named stock, and describes them no more closely, the bequest is general: Tifft v. Porter, 8 N. Y. 516. "I give to," etc., naming the legatee, "twenty-five shares of the," etc., naming the corporation, "or the proceeds of the same, should the same have been sold," is a general bequest: Osborne v. McAlpine, 4 Redf. Sur. 1. Executors were directed by the will to keep fifteen thousand dollars invested in government bonds and pay the income to the husband of the testatrix from the date of her death. The bequest was not specific but general, even if the testatrix had owned the bonds when making the will: Jackson v. Westerfield, 61 How. Pr. 399. There was a bequest of two thousand dollars and another of one thousand, in each case the sum given being named as in government bonds. The bequests were general: In re Newman, 4 Dem. Sur. 65. If one has bonds and stocks of many sorts, and makes bequests, in varying sums to various persons, of "my" stocks and bonds as of their par value and without identifying them more closely, the bequests are general: In re Hadden, 1 Con. Sur. 306, 9 N. Y. Supp. 453. A bequest was of "the sum of fifty thousand dollars of the capital stock of the [etc., naming the company], or in case I shall not hold that amount of such stock . . . I direct them [the executors] to take from my other personal property an amount sufficient to equal said sum." There were words in the will

whereby other persons were given bequests in varying amounts in "shares of the capital stock" of the same company. The bequest was held to be pecuniary and general, not specific: In re Anderson, 19 Misc. Rep. 210, 43 N. Y. Supp. 1143.

A bequest was of the contents, as such might be at the time of testator's death, of a box with a safe deposit company to several persons in stated proportions. When the testator died the box was found to contain stocks, bonds and life insurance policies. The securities were of all sorts of values, and it was impossible to divide them among the legatees. The bequests were held to be general: In re Fisher, 93 App. Div. 186, 87 N. Y. Supp. 567. Under the terms of a will the testator's debts were to be paid, his wife was to have the family residence for life and was to have also the household furniture, etc. The residue was to go to the children subject to the wife's dower. By a codicil the testator put corporate stock in the hands of trustees, in trust, to be held for a named period, the dividends to be distributed among the beneficiaries, and to these the shares were to be delivered at the end of the trust. The testator owned real estate, but it brought in nothing, and the stock was the only money making part of the estate when the codicil was made. It was held that the bequest of the dividends was general and was burdened with an obligation to pay debts: In re Noon's Estate, 49 Or. 286, 88 Pac. 673, 90 Pac. 673.

A bequest of "fifteen shares of" a named stock is a general bequest, and the testator's owning fifteen shares of such stock when making his will and also at his death does not render it otherwise: Appeal of Sponsler, 107 Pa. 95. A testator had at his death forty-three thousand dollars in unregistered six per cent bonds of a certain company and five thousand dollars in like bonds registered in the name of another person, deceased. The latter's widow was given by the testator a bequest of forty-eight thousand dollars in the six per cent bonds of the company. The bequest was general: In re Cummings' Estate, 12 Pa. Co. Ct. 45, 2 Pa. Dist. R. 51. Bequests were made to several persons, in varying amounts, of certain shares of stock stated in the will to be owned by the testator and standing in his name on the books of the company. The bequests in all amounted to two thousand two hundred shares. When making the will testator had three thousand two hundred and fifty-seven shares, but had only two hundred shares when he died. The bequests were general and so not subject to ademption: Mahony v. Holt, 19 R. I. 660, 36 Atl. 1.

A will provided for a bequest of ten thousand dollars in money, stocks, bonds or notes that the testator might have at his death. At his death he had of money but a few hundred dollars, seven thousand and forty dollars' worth of railroad stock, two thousand two hundred dollars in good notes, and three thousand dollars in desperate ones. The legacy was general: Martin v. Osborne, 85 Tenn. 420, 3

S. W. 647. There was a bequest to the testator's daughter of three hundred dollars per annum, interest on five thousand dollars' worth of state stock of Virginia. It was a general bequest: Corbin v. Mills' Exrs., 19 Gratt. 438. A bequest was of certain named stocks and ten thousand dollars in such United States six per cent stock, bank or other stocks at the current value not under par, or money, as may, as the will ran, be on hand, not otherwise appropriated, with power in the executors to change the investment of the funds under the direction of the orphans' court. This was a general legacy: Ladd v. Ladd, 2 Cranch C. C. 505, Fed. Cas. No. 7972.

Stated Derivation of Subject of Bequest.—A bequest in trust of "the sum of eighteen thousand dollars, first to be taken out of the proceeds of the sale of realty," etc., is not specific but general—a general bequest of money to a certain amount to be paid, in the first instance, out of a fund produced from the sale of realty, then out of the residuum in case of the insufficiency of the other: Hutchinson v. Fuller, 75 Ga. 88. A person was given by will money payable out of stock named, owned by the testator. The bequest was held to be a general one, and no specific shares of stock were susceptible of levy in aid of the legatee's judgment creditor: Stout v. La Follette, 64 Ind. 365. "I give and bequeath to my said father and mother the sum of three thousand dollars, and I desire my executors to pay the same over to them out of my life insurance money payable to my executor as soon as collected." This was a general bequest payable from the general assets of the estate in case of a failure to collect the life insurance policy: Byrne v. Hume, 86 Mich. 546, 49 N. W. 575.

A testator gave his wife the sum of twenty thousand dollars to be paid in installments, the first installment to be due in twelve months after his death; he then went on to say how this was to be paid out of this note and that owing him. The balance of the installments were to be paid in money at the wife's desire; the remaining installments to be paid annually from the sale of the produce of his farm. It was a general pecuniary legacy that was not lost in case the funds failed to which it was referred: Mitchener v. Atchinson, 62 N. C. 23.

A bequest of money in a will directing the payment of legacies out of the personal property is not a specific or demonstrative bequest, but a general one: Glass v. Dunn, 17 Ohio St. 413. Bequests of "all moneys or legacies coming to me from any source" are not specific, but general: Dean v. Rounds, 18 R. I. 436, 27 Atl. 515, 28 Atl. 802. There were bequests to two daughters of one thousand dollars each, "to be paid in either money or negroes at their value," and a bequest to a son of "two thousand dollars, etc., negroes Lewis, Jane, Buck, Daniel, Bob and Prince to be divided according to valuation between [the three children] to answer to the amount above bequeathed." The bequests were not specific, but pecuniary and general: Bell v. Hughes (S. C.), 8 Rich. 397.

Whether a bequest, made in general terms, is specific or not so depends on whether the things bequeathed are or are not specific in character; so, where a will gave "all property, real and personal," which the testator had received through his wife and the property so received was found to have been received in money wholly, the bequest was held to be a general one: Pell v. Pell, Speer Eq. 18.

Residuary Bequests, Actual, Virtual or Quasi.—A testator disposed specifically of his personal property and then gave to his executor "the rest and residue of" his estate except some contingent bequests in trust to manage for the benefit of a daughter until her maturity, upon which he was to hand it over to her. This was a devise to the daughter so far as the real estate was concerned, and she did not take only as a residuary legatee: Maybury v. Grady, 67 Ala. 147. By the first clause of a will all the testator's estate, real, personal and mixed, was given to his wife for life with remainder over to his children, and by a subsequent clause provided that some sums of money that would or might come into his estate afterward should, when received, be divided among the wife and children. The later clause did not, it was held, change the effect of that foregoing so as to make residuary legatees of the persons taking under the first clause: Henning v. Varner, 34 Md. 102.

A residuary legacy is not regarded as specific, and the residuary legatee cannot call upon the other legatees to abate: Blaney v. Blaney, 1 Cush. 107. A devise by way of residue shows that the devisee is to have something uncertain and unknown: Anderson's Exrs. v. Anderson, 31 N. J. Eq. 560. There was a bequest of thirteen hundred dollars in trust for a brother during life, after which five hundred dollars of it was to go to the brother's son T., and the remainder to his other children equally. A part of the thirteen hundred dollars was used in paying debts of the estate. The bequest of the eight hundred dollars was held to be not a residuary legacy and that T.'s share must abate with that of the others: Van Nest v. Van Nest, 43 N. J. Eq. 126, 13 Atl. 179. A gift to a wife of "all my property, house and lot and store, and all my personal property therein," followed in a will some legacies to other persons. It was held it was clearly specific and was not a residuary gift, and so was not called on to abate, the personal property being insufficient: In re Lynch's Estate, 13 Phila. 322. A residuary bequest is general and not specific, although articles bequeathed are enumerated: In re Martin, 25 R. I. 1, 54 Atl. 589. A will disposed of a part of the testator's personal property, and directed that his funeral expenses and debts be paid out of any money that might come into the hands of the executors; it then required these to sell the real property, and out of the product pay specific sums to certain devisees, among them two nieces, and divide the remainder, if there should be any, between these two nieces. It was held that the nieces took this as residuary legatees: Darden v. Hatcher, 1 Cold. (41 Tenn.) 513.

There was a specific pecuniary bequest given to a person, and this person also made residuary legatee. The same will gave annuities and other specific pecuniary legacies to other persons, and provided "that in case the personal estate and the produce arising from the real estate, which I shall die seised and possessed of, shall not be sufficient to answer said annuities and legacies, then said legacies and annuities shall not abate in proportion, but the whole deficiency, if any, shall be deducted from the legacy bequeathed to," etc. (naming the pecuniary legatee here first above mentioned). When the testator died his estate was amply sufficient to pay all the debts, of the executor. It was held that since the specific pecuniary bequest and the residuum had been given to the one person, and upon the same terms, and the testator appeared not to have intended the pecuniary legacy to have a preference over the residuum, that legacy assumed the character of a residuary bequest and was liable to deduction for deficiency in the other specific annuities: Sibley v. Young, 3 Cranch, 249, 2 L. Ed. 429.

Words of Testator Identifying Items in Residuum.—There were pecuniary bequests and these words follow: "I give, devise and bequeath to A. the residue of said unimproved lot, my property on W. street in said town of R., improved by the brick dwelling-house in which I now reside, and the brick dwelling in which C. has his saddler's shop, all my household and kitchen furniture, stocks, bonds, notes and other evidences of debt, and all the rest and residue of my estate, real, personal and mixed, to her, her heirs and assigns forever, in fee simple." Here the bequest was general, and for payment of the pecuniary bequests the legatees could look to the proceeds of the furniture, etc.: England v. Vestry of Prince Georgia Parish, 53 Md. 466.

Where in a bequest to the residuary legatee certain articles are named as being of it with such words following as "and all the rest and residue of my estate," this does not necessarily make the bequest specific as to the articles named: Le Rougetel v. Mann, 63 N. H. 472, 3 Atl. 746. The stating in a residuary devise of what things go to make up the residue, bequeathed equally to persons named, and the directing that if any of these things be sold they be made up at a specific value, do not make the devise specific: Bailey v. Wagner, 2 Strob. Eq. 1.

Estate Entire or in Portions.—A provision in a will that the wife of the testator shall receive one-half of all property of which he may die seised does not effect a specific, but a general, bequest: Abila v. Burnett, 33 Cal. 658. A provision that a son under age shall be educated and supported up to full age and that then he be given the residue of the estate in the executor's hands does not amount to anything but a general legacy: Bradford v. Haynes, 20 Me. 105. Where a devise is "of all my property," and the testator proceeds then to details of it and to except an item here and there, it is a general devise; as also a devise of "all the rest of my books," after named

ones have been devised already, "with my household furniture to be preserved by my wife for her own use during her life, as hereinbefore mentioned, or to be sold or given to our children or grandchildren in such manner or proportions as she may think proper": Mayo v. Bland, 4 Md. Ch. 484.

A bequest of all the remainder of an estate, after the legacies, made by the will, shall have been paid and specific gifts deducted, is general: Hays v. Jackson, 6 Mass. 149. The following bequest was held to be not specific, to wit: "I give and bequeath to my beloved wife Nancy all my real estate, personal property, house, furniture," etc., "to have and to hold as hers as long as she shall live, and after her death the property that is remaining I request to be divided among my surviving children": Calkins v. Calkins, 1 Redf. Sur. 337.

After making his will the testator added a codicil thus: "Should I alone die on this trip, or in consequence of it, then, of the one thousand dollars before willed to my wife, five hundred dollars of this money are to be deducted from her and given to my daughter Lillie, or Lillian, before mentioned." By the will proper no specific sum of one thousand dollars had, in fact, been given to the wife, but to her and another daughter there had been given the residue of the estate, the value of which exceeded two thousand dollars. The bequest was general: Adair v. Adair, 11 N. D. 175, 90 N. W. 804.

A man gave to his wife by will his real estate, together with all his furniture, plate, personal property, debts due, etc. Then a trust was created, for the benefit of his son and married daughters, in lands. Fresh real estate became his after the making of the will but he died, having made no codicil and leaving debts. It was decided the wife had a general bequest and that this must be resorted to before the newly acquired real estate in paying the debts, since no intention appeared by the will that it be spared: In re Walker's Estate, 3 Rawle, 229. There was a bequest to a daughter of "all I now possess." The testatrix provided then that the daughter should take as well "the bond held by me." It was decided that "all I now possess" was a general bequest: In re Zeller's Estate, 2 Woodw. Dec. 191.

It was stated in a will that one—an expectant beneficiary—had slaves of his own, and the testator proceeded to give to two others "all the slaves" which he, the testator, might have at his death. This was a general bequest: Jenkins v. Hanahan, Cheves Eq. 129. A man directed by will that all his estate, after the debts should have been paid, should be divided equally between, etc. When making the will he had only personal property but acquired real afterward. The legacies were general: Henry v. Graham, 9 Rich. Eq. 100. Executors were directed to sell all property not specifically devised, to get in all debts owing the testator and devote the interest arising from the fund to schooling the children; and at the maturity of the latter, each, to pay him or her an equal share of the principal. These be-

quests were general: McFadden v. Hefley, 28 S. C. 317, 13 Am. St. Rep. 675, 5 S. E. 812.

"It is necessary to bear in mind one or two elementary rules governing the construction of wills. The first is that a will should be construed according to the intention of the testator": Wetmore v. St. Luke's Hospital, 56 Hun, 313, 9 N. Y. Supp. 753. Whether a legacy is specific or general depends on the intention of the testator: Cuthbert v. Cuthbert, 3 Yeates, 486. A legacy will not be held to be specific unless the intention in the will to make it so be clear: Morriss v. Garland's Admr., 78 Va. 215. This intent must be deduced from the face of the will: Estate of Young, 123 Cal. 337, 55 Pac. 1011. However, at the same time the testator must use language sufficient for his purpose: Estate of Young, 123 Cal. 337, 55 Pac. 1011. In other words, it must not be left to be inferred from the will that he meant this thing or that, for no matter how strong the inference in favor of the specific quality, if that is all the court has to go upon it will fall back upon the rule that solves doubt by making bequests specific whenever possible. It has been already said that in Sibley v. Perry, 7 Ves. 522, Lord Eldon admitted a belief that the testator really intended the bequest to be specific. If the testator had been more particular with his language, that belief must have been rather a conviction, and the court would have had no excuse for availing itself of the rule its conservatism inclined it to favor.

In Missouri Baptist Sanitarium v. McCune, 112 Mo. App. 332, 87 S. W. 93, the testatrix had made several specific bequests showing thereby that she knew how to make them, and this knowledge was imputed to her by the court in construing other bequests which, if intended by her to be specific, were certainly not expressed as if she had given them the benefit of her knowledge. In Witherspoon v. Watts, 18 S. C. 396, when the court found reason to impute knowledge similarly to the testator, it held that his referring in a later clause in the will to the legacy as having been "specifically" disposed of was entitled to weight.

In Methodist Episcopal Church v. Hebard, 28 App. Div. 548, 51 N. Y. Supp. 546, it was held that a bequest was demonstrative if the will showed clearly the testator's intention that the legatee should have the money. That is all very well, but a bequest of money in broad terms without identifying words or mention of a fund for paying it would hardly have that effect. In one case the testator referring to the legacy after making it called it "specific," but it did not satisfy the criteria, and the court said it was not such: Parker's Exrs. v. Moore, 25 N. J. Eq. 228.

In Estate of Young, 123 Cal. 337, 55 Pac. 1011, it is said, to be sure, that even if the legal effect of the testator's expressed intent is intestacy, it will be presumed he designed that result. That is going rather far; the courts do not favor intestacy: Le Breton v. Cook, 107 Cal. 410, 40 Pac. 552. A testator may defeat his own in-

tention. Through omissions or clashing provisions in the will, it may be impossible to enforce the intention: Wetmore v. St. Luke's Hospital, 56 Hun, 313, 9 N. Y. Supp. 753.

The intention must be indicated too by the will itself. It was held in Cagney v. O'Brien, 83 Ill. 72, that a bequest of money to be disposed of by the executor "according to verbal instructions given them by" the testator is not to be taken as a specific legacy in the face of express words in the will declaring a trust. To find out what the testator's intent was, one is not restricted to any item, phrase or paragraph in a will, but may take the latter as a whole and judge it according to its spirit, as in Re Carr, 24 Misc. Rep. 143, 53 N. Y. Supp. 555. That the intention of the testator in respect to a disposition in one part of his will may be reflected from another part is shown in Appeal of Knecht, 71 Pa. 333, when the rule is applied. In Douglass v. Douglass, 13 App. D. C. 21, the expression "my other" served to fix the possessive character on the subject of a preceding bequest, being used to describe stock or bonds bequeathed. To the same effect, see Harvard Unitarian Society v. Tafts, 151 Mass. 76, 7 L. R. A. 390, 23 N. E. 1006, where the expression was "the balance of my stock"; and Everitt v. Lane, 37 N. C. 548, where it was "the balance of my negroes." In McGuire v. Evans, 40 N. C. 269, the expression was: "In case there should be any deficiency in the bank stock which I hold at my death as compared with the amount bequeathed in my will," etc.; and the effect was to make the bequests referred to specific.

But nothing is to be merely inferred or presumed from the will or circumstances affecting it. In a case in Iowa a legacy of a stated sum of money had been left to a daughter of the testator and general legacies to his sisters, and it was contended that the legacy to the daughter was intended as specific since naturally the testator would discriminate in favor of a daughter, as against sisters, besides which the daughter had received first attention in the will; but the court would not admit the contention: In re Parson's Estate (Iowa), 129 N. W. 955. Another apt illustration was a case in New York where it was held that the gift by a testator of a gold watch to one daughter raises no presumption that in then giving another daughter thirty-five dollars in money he intended the money gift to be specific: Bliven v. Seymour, 88 N. Y. 469.

ESTATE OF ALFRED MAX HARTTER, DECEASED.

[No. 16,959 N. S.]

Wills—Execution—Subscription at End—Signature of Testator in Attestation Clause.—Where a testator writes his name in a blank space in the attestation clause of his will, instead of at the usual place, the instrument will not be denied probate as not "subscribed at the end thereof," when it distinctly appears that it was intended by him, and so understood by the witnesses, as his subscription of the will.

Edward C. Harrison and Maurice E. Harrison, for proponent.

COFFEY, J. The petition in this matter propounds for probate a document of which the following is a copy:

"IN THE NAME OF GOD, AMEN!

"I ALFRED MAX HARTTER being of sound mind and memory, but knowing the uncertainty of human life, do now make and publish this my last will and testament, that is to say: that I bequeath my whole estate to my mother EMILY HARTTER."

"_____. (Seal)"

"Signed, sealed, published and declared by the said ALFRED MAX HARTTER, the testator, as and for his last will and testament; and we, at his request and in his presence, and in the presence of each other, have hereunto subscribed our names as witnesses thereto, this fifteenth day of August, A. D. 1912.

"Attest: JOHN B. WUERSCHING.

"JOHNSON SCHOLL BRUNER SMITH."

Mr. Smith, one of the subscribing witnesses, testifies that the name "Alfred Max Hartter," where it last appears in this document, was written by the decedent in the presence of the witnesses, that he declared to them the document to be his will, and had them both, at his request, and in his presence, sign it as witnesses.

The entire written part was inserted by the hand of testator in the presence of the witnesses.

All the document following the word "Seal," with the exception of the date and the three names appearing, is in print.

Is this will "subscribed at the end thereof"?

The courts of California furnish no answer to this question.

The supreme court of Ohio has answered it in the negative in the case of Sears v. Sears, 77 Ohio St. 104, in which case that court said:

"In the case before us the will is not signed by the testatrix at the end thereof. The testimonium clause is as follows: 'In testimony whereof, I have set my hand to this my last will and testament, at Lakewood, Ohio, this sixth day of June, in the year of our Lord one thousand nine hundred and three ——.' The obvious purpose for which this blank line was left was for the signature of the testatrix, and it was intended as the end of the will. The absence of her signature there not only discloses that the will is not signed by her at the end thereof, but also implies that she did not sign it at all. The attestation clause signed by the witnesses recites that the foregoing instrument was signed by the said Arminda S. Nicholson in our presence; but this does not change the fact, and in the absence of a signature is without legal effect. If a scrivener had prepared the will, and had written her name where it appears in the attestation clause, her name there would have been merely *descriptio personae;* and, when it is shown that the testatrix was her own scrivener, the natural presumption is that it was so intended; and, even if the fact was that the testatrix wrote her name there, intending by that act to sign her will, still her signature would not be at the end of the will, and her intention could not have the effect of transposing it. The question is, not, What did the testatrix intend? but, What did she do?"

In New York the contrary rule is decisively established and the question in this case answered in the affirmative.

Testatrix drafted a will, and left a blank space in the testimonium clause for date of execution, and also a blank space in the attestation clause so that it read, "Subscribed

by ——, the testatrix," etc. Thereafter, while some friends were visiting her, she produced the paper, and announced that she wished to execute it as and for her will. She thereupon filled in the date in the testimonium clause, and subscribed her name in the blank space in the attestation clause, declared it to be her will, and requested her friends to sign as subscribing witnesses, which they did. Held that, since the attestation clause is no part of the will, the signature of the testator was subscribed at the end of the will and that it was entitled to probate:

In re Noon's Will, 31 Misc. 420, 65 N. Y. Supp. 568;

In re Gibson's Will, 128 App. Div. 769, 113 N. Y. Supp. 266.

The statute provides: "A will shall be subscribed by the testator at the end of the will." This requirement is an essential, but it is to be construed liberally in favor of the will, and no rules of construction should extend beyond the requirement of the statute: Hoysradt v. Kingman, 22 N. Y. 372. The reason for requiring the signature of the testator to be at the end of the will is for the purpose of avoiding additions to the will after its execution. The law does not require any particular form for the wording of a will, and it is very usual to find words and phrases in a will other than disposing words. It is not unusual to find words of advice and direction in a will, as well as bequests. A will may be valid without making any disposition of property, as, for example, where a will merely appoints an executor. It is a rule of very general application that surplus words in a document do not vitiate it, so in the will under consideration some of the words of the attestation clause are incorporated in the will, and that is in no sense harmful. The attestation clause is no necessary part of the will: Jackson v. Jackson, 39 N. Y. 156. A regular attestation clause is useful as a memorandum of the essentials that occurred at the time of the execution of the will and as an aid to the memory of the witnesses, and is especially valuable in case of the death of the subscribing witnesses. It is not essential to the validity of a will. The form of the attestation clause is not material.

In considering this case, we find that an almost similar question has been before the courts on other occasions. In the case of Younger v. Duffie, 94 N. Y. 535, 46 Am. Rep. 156, the testator signed at the end of the attestation clause, and, after his signature, came that of the subscribing witnesses, which was held a substantial compliance with the statute, and that the signature was at the end of the will; citing Matter of Gilman, 38 Barb. 364, holding in substance that, if no disposing provision follows the testator's signature, the signature is at the end of the will. In Will of Cohen, 1 Tucker, 286, the testator signed beneath the attestation clause, and the execution was held good. Under an English statute of wills (1 Vict. c. 28, sec. 9), similar to ours, a testator signed his will by writing his name in the attestation clause. It was held that the signature was at the end of the will and the will entitled to probate. In Goods of Walker, 2 Swa. & T. 354. In Matter of Noon, 31 Misc. Rep. 421, 65 N. Y. Supp. 568, the testator used a printed will blank on which she wrote her will and subscribed in the attestation clause. The court held that the name being in the attestation clause was at the physical end of the will, inasmuch as the attestation clause is not a necessary part of the will. Matter of Acker, 5 Dem. Sur. (N. Y.) 19, is to the same effect.

It is clear from the foregoing decisions that the testatrix by signing in the attestation clause incorporated in her will a part of the attestation clause, which is surplusage, and the signing was as truly at the end of the will as though she had signed just above the attestation clause, as is usually done. The testatrix in this case did not divide her will into paragraphs; the whole will being one solid paragraph. I am satisfied that she complied with the requirements of the statute as to the signing of the will. Some of the contestants have confused the case of Sisters of Charity v. Kelly, 67 N. Y. 409, thinking it authority against this will, but I do not so read that case, which is easily distinguishable, the facts being different in the two cases, as Kelly, the testator, signed after the witnesses had signed. There is nothing in the Kelly case that can be construed as an authority against the will in question: In re De Hart's Will, 67 Misc. Rep. 13, 122 N. Y.

Supp. 220; Matter of Acker, 5 Dem. Sur. (N. Y.) 19. And to the same effect see: Matter of Walker, 8 Jur. (N. S.) 314, 31 L. J. P. & M. 62; 5 L. T. (N. S.) 766.

The same courts hold even that a signature after the attestation clause is good: Younger v Duffie, 94 N. Y. 535, 46 Am. Rep. 156; Matter of Laudy, 78 Hun, 479, 29 N. Y. Supp. 136, 147 N. Y. 699, 42 N. E. 724; Cohen's Will, Tuck. Sur. 286.

So also holds the supreme court of Wisconsin: In re Young, 153 Wis. 337, 141 N. W. 226.

The cases in California which come nearest to the question are: Estate of McCullough, Myr. Pro. Rep. 76; Estate of Blake, 136 Cal. 306, 89 Am. St. Rep. 135, 68 Pac. 827; Estate of Seaman, 146 Cal. 455, 106 Am. St. Rep. 53, 80 Pac. 700, 2 Ann. Cas. 726; Estate of Williams, 5 Cof. Pro. Dec. 1–24.

None of these decisions is sufficiently close in point to give the court much aid; but expressions are found in the opinions, which incline to favor the New York rule.

It is a settled rule that the technicalities of the law relating to the making of wills are deemed to have been satisfied, where the circumstances surrounding the transaction show a substantial compliance: Estate of Williams, supra.

In determining what is the end of a particular will, no doubt the principle of liberal construction may be applied. (Chief Justice Beatty in concurring opinion in Estate of Seaman, supra.)

In this case of Seaman the will was denied probate as not properly executed; but an examination of the opinion shows that this holding was based upon and followed New York cases almost exclusively; and not one of the cases from New York hereinbefore cited is there alluded to; from which it plainly appears that the facts in that case (and in the New York cases there discussed and followed) call for the application of a different principle and a different rule from the one laid down in the New York cases here cited, the first four of which listed are, as to the facts, identical with this.

Section 1276 of the Civil Code requires every will other than nuncupative or holographic to be "subscribed at the end thereof," by the testator in the presence of two attest-

ing witnesses, each of whom must in his presence and at his request sign his name as a witness "at the end of the will." This section is from the Revised Statutes of New York, adopted by that state in 1830. These provisions were incorporated into the Civil Code prepared for adoption by that state by David Dudley Field, and in their report of a Civil Code to the legislature of 1871, the code commissioners of this state refer to this code as the source of the section. In considering the section the decisions of that state upon the same question are therefore entitled to great consideration.

The true test to determine whether a decedent has subscribed his name at the end of a will is to take the document as it left his hand, and then, disregarding the signatures of the witnesses, and all evidence aliunde, to see whether it is apparent that his name was placed where it appears for the purpose of execution: Estate Seaman, 146 Cal. 460–467, 106 Am. St. Rep. 53, 80 Pac. 700, 2 Ann. Cas. 726.

This will must be regarded as sufficiently executed, in all respects. The only question relates to the subscription. That the place where he wrote his name was intended by him to be a subscription of his will, there can be no doubt, and it was that signature which the witnesses attested. That it was written in a blank space in the attestation clause can make no difference, when it distinctly appears that it was intended by him, and so understood by the witneses, as his subscription of the will, and it is, substantially, at the end thereof. There is nothing in the case of Sisters of Charity v. Kelly (67 N. Y. 409), which conflicts with this view: Matter of Acker, 5 Dem., Sur., R. (N. Y.) 20.

In such circumstances, and in the condition of the authorities, it should seem that, in this instance, within the limitations of the evidence in this particular case, it would be safe for the court to follow the lead of the New York cases and admit the paper to probate, and it is so ordered.

The Rule That the Signature of a testator shall be at the end of the will is the subject of a note in Ann. Cas. 1913C, 845.

ESTATE OF LEONCIE ESPITALLIER, DECEASED.

[No. 17,286 (N. S.); March, 1915.]

Will—Instrument Drawn by Layman—Interpretation.—A will drawn by a person not educated in the ordinary sense, nor skilled in the use of legal formulae, is not to be treated with the strictness that is applied to the work of a professional draftsman.

Will—Disposition of Entire Estate—Presumption.—A will, as such, raises the presumption that its maker intends to dispose of his or her entire estate, and not to die intestate as to a part; and the presumption is strengthened by the absence of a residuary clause.

Will—Omission of Word—Whether Invalidates.—The inadvertent omission of a word will not be allowed to defeat a will if the intention of the testator can be discovered from the entire document, and a reasonable reading of its text, and a consideration of all the circumstances.

Will—Interpretation—Supplying or Changing Words.—In the construction of wills the intention of the testator must govern, and in order to carry out this, as collected from the context, words may be, when necessary, supplied, transferred or changed.

Will—Dollar-Mark Before Legacy—Omission.—The omission of the dollar-mark before the figures of a legacy is frequent in wills, and is implied by courts construing them.

Will—Instrument in French Language—Kind of Money Bequeathed. If, in a will in the French language, there is an absence of express words or signs indicating the sort of money to which numerical figures used have reference, in respect of legacies, the word "dollars" or "francs" may be read into the will according to the aptness of either in the opinion of the court, judging from the connection and the circumstances.

Application for distribution.

P. A. Bergerot and A. P. Dessouslavy, for petitioner Arthur Queyrel, administrator with will annexed.

Titus, Creed, Jones & Dall, for Eli Queyrel, objecting.

Gerald C. Halsey, for Monsieur Heurck, also objecting.

COFFEY, J. Petitioner, after reciting the death of testatrix, which occurred May 3, 1914, the admission of her will to probate, and other antecedent facts of administration, and

the condition of the estate and its readiness for settlement and distribution, states that decedent was unmarried and left no children or other issue or father or mother, and that her only next of kin and sole heirs at law were her brothers Eli, Louis, and Arthur Queyrel; Rose Rougon, a sister; Antoine Ferdinand Queyrel, a nephew; children of a deceased brother, and Joseph, Paul and Gaston, other nephews, children of a deceased sister, asks for distribution to himself and Benjamin Queyrel, not named but described in the will as "my cousin at Grenoble," and, averring that the attempted legacies to the other persons named are void and of no testamentary effect, prays that the remainder of the estate be distributed to the heirs at law.

This will is of the most informal character, written in the native language of the testatrix, except as to the word or abbreviation "dol." at the end of the first bequest. It is entirely in her handwriting, and is as follows, with translation:

"Le testament qui
et dans ma malle
n'est pas bon
Je laisse a mon frere
Arthur 500 dol.
a mon frere Eli 1000.
a mon cousin a grenoble
500 fr.
Monsieur Heurck
1500
San Francisco le
2 Mai 1914

"LEONCIE ESPITALLIER."

A translation of said will into the English language is as follows:

"The testament which is in my trunk is not good.
I leave to my brother Arthur 500 dollars.
To my brother Eli 1000.
To my cousin at Grenoble 500 fr.
Monsieur Heurck 1500.
San Francisco May 2, 1914.

"LEONCIE ESPITALLIER."

The only question involved is, whether effect can be given to the bequests to Eli Queyrel and Monsieur Heurck. The evidence shows that all the legatees named in the instrument were residents of this county except one residing at Grenoble, France.

Testatrix was a resident of San Francisco at the date of the will, and had resided here for many years prior thereto. Her fortune consisted of a deposit in the French-American Savings Bank, amounting to about $3,900. After paying all charges and expenses of administration, the balance expressed in American money amounts to $3,116.09. The bank account denotes dollars.

Petitioner contends that the so-called bequests to Eli Queyrel and Monsieur Heurck are void for uncertainty; that rules of construction may only be invoked to ascertain the meaning of the language actually used; and that an omitted word, if it can be supplied by construction at all, can be supplied only where such omitted word is manifest and certain. He claims that this case is not so much of an uncertainty arising upon the face of the will, as failure to complete the execution.

There are certain rules in construing wills that are axiomatic and need no citations, although in this case counsel have furnished an abundance of authorities to support their respective contentions.

We must take the document as a whole and endeavor to sustain the evident purpose of testatrix by a sensible and reasonable construction, rather than by a strained, artificial and technical interpretation to defeat her manifest design.

It must be premised that this document was drawn by a person, if not ignorant or illiterate, not educated in the ordinary sense, certainly not skilled in the use of legal formulae; and it is therefore not to be treated with the strictness that is applied to the work of a professional draftsman.

The instrument should be taken as a whole and not subjected to the strain of a construction that would force the entire purpose out of the natural channel into the narrow legal groove in which the mind of testatrix was unaccustomed to travel.

It is the duty of the court to look for general intent, to put itself in the place of testatrix, to regard coexistent circumstances, and, if a technical construction is at variance with the obvious general intention, to apply a rule of interpretation which will carry out the design of testatrix and give to her language its ordinary effect: Estate of Pearsons, 113 Cal. 577, 45 Pac. 849, 1062.

This is a mere statement of the universal rule in such cases.

But it is said here that interpretation of words used or construction of language employed is one thing, and insertion of words or phrases omitted is quite another matter, and that the court here is asked to insert material expressions necessary to supply testamentary inadequacy, or to make a new will, as to certain attempted legacies which otherwise would fail because testatrix did not designate fully the character of her benefactions.

This is the whole burden of the contention of petitioner Arthur Queyrel; that, because of the omission of the monetary mark or word in the legacies to Eli Queyrel and Monsieur Heurck, testator's attempt at a benefaction to either of them is ineffectual.

"In case of uncertainty arising upon the face of a will, as to the application of any of its provisions, the testator's intention is to be ascertained from the words of the will, taking into view the circumstances under which it was made, exclusive of his oral declarations": Civil Code, sec. 1318.

"In order that a specific devise or bequest shall be effective it is necessary that the subject matter thereof shall be so described as to make it sufficiently certain what was the testator's intention; and when the gift is a pecuniary one it is necessary that the amount intended shall be definite and certain": 40 Am. & Eng. Ency. 694.

"Where it is impossible to ascertain the subject matter or the objects of a gift it will be void for uncertainty": 40 Am. & Eng. Ency. 693.

"Where the testator's intention is manifest from the context of the will and surrounding circumstances, but is endangered and obscured by inapt and inaccurate modes of expression, the language will be subordinated to the intention . . . This

rule, however, applies only where it is necessary to effectuate the testator's intention, which is clearly apparent, but has been defectively expressed in the will. . . . Furthermore, in supplying words in a will, such words only can be supplied as it is evident the testator intended to use": 40 Cyc. 1399.

In Mitchell v. Donohoe, 100 Cal. 202, 208, 38 Am. St. Rep. 279, 34 Pac. 614, it is said: "Courts, in reading wills, always supply obviously omitted words, wherever the word omitted is apparent, and no other word will supply the defect.

"A word that has been manifestly omitted . . . will be supplied": Estate of Stratton, 112 Cal. 518, 44 Pac. 1028.

In considering this matter we must always bear in mind our own code sections, one of which says that the words of a will are to receive an interpretation which will give to every expression some effect, rather than one which will render any of the expressions inoperative: Civil Code, sec. 1325.

The very fact of making a will raises a presumption that the testatrix intended to dispose of all of her property.

A will is an instrument by which a person makes a disposition of his property to take effect after his death. A will when it operates upon personal property is sometimes called a "testament," in foreign law usually so, but the more general denomination when it embraces both species of estate is that of "last will and testament."

In this case personal property alone is in question. Testatrix left only a deposit in dollars in the savings bank, and the word she used to describe her disposition is "testament," the term most appropriate for her purpose in the language of her own original country. The testament she left in her trunk she declared not good, and now she leaves her possessions as set forth in the new instrument, to certain indicated persons, as the only objects of her bounty; no others named; and no residuary clause. No executor named.

The presumption is, as has been time and again stated by our appellate courts, that a testatrix intends to dispose of her entire estate and not to die intestate as to any part thereof, and the will should be so construed unless this presumption is clearly rebutted by the provisions of the will or by evi-

dence to the contrary, and the fact that there is no residuary clause in this will strengthens the presumption.

"A will is to be construed according to the intention of the testator; and where his intention cannot have effect to its full extent, it must have effect as far as possible. The intention is to be ascertained from the words of the will, taking into view the facts and circumstances under which it was made, if shown; otherwise, the will must be its own interpreter. The will must have a liberal construction, and a construction thereof favorable to testacy will always obtain when the language used reasonably admits of such construction": McClellan v. Weaver, 4 Cal. App. 593, 88 Pac. 646.

We should have a sensible and reasonable construction, not a forced and technical one; a liberal interpretation, not a narrow or strained endeavor to wrest the context from the circumstances and to pervert the purpose of the testatrix.

While she may not have been an educated woman, the testatrix was intelligent and sufficiently versed in language to understand what she desired to do with her money. She used apt terms to express her meaning, except as to filling out the words or signs indicating in two instances the monetary unit. Did she mean dollars or francs, or did she design to make a vain bequest? This latter cannot be presumed. The context and the circumstances may be taken together to supply the casual omission.

Standing in its present form there might be uncertainty as to the amounts of the bequests; but the inadvertent omission of a word will not be allowed to defeat the will, if the intention of the testator can be discovered from the entire document and a reasonable reading of its text and a consideration of the circumstances.

Testatrix certainly intended to give her brother Eli and Monsieur Heurck something. She did not intend to die intestate, partially or totally, and the law does not favor any construction leading to such result, if it can reasonably or possibly be avoided: Le Breton v. Cook, 107 Cal. 416, 40 Pac. 552.

Where it is possible for the court upon a reading of the whole will to reach the conclusion that the testatrix meant to

give a certain amount to beneficiaries,where she did not use express or formal words, the court should supply the defect by implication, and so mold the language as to carry out the intention which it is of opinion the instrument sufficiently declared, and our code authorizes this mode of interpretation: Civil Code, sec. 1340.

It is laid down that, in certain cases, in order to reach the obvious general intent of the testatrix, implications may supply verbal omissions: Estate of Callaghan, 119 Cal. 571, 51 Pac. 860, 39 L. R. A. 689.

Inadvertent omissions may be supplied. This construction is in consonance with the entire will, and if it were not so applied, it is apparent that the intention of the testatrix would be defeated. This has been done in many instances for the purpose of effectuating the true intention of the testatrix: Bacon v. Nichols, 47 Colo. 31, 105 Pac. 1082.

The intention of the testatrix apparent in the will itself must govern, and in order to execute her design, as collected from the context, words may, when necessary, be supplied, transposed or changed.

This is not making a new will; it is in furtherance of the testamentary purpose of the testatrix deducible from the instrument in probate.

Cases are numerous on this point. A few citations will suffice.

A bequest of "5000." in connection with other money legacies may be read $5,000: Page on Wills, 559, citing Ross v. Kiger, 42 W. Va. 402, 26 S. E. 193; 30 Am. & Eng. Ency. Law, 690.

Where it is evident from the context that the testator's intention had been inaccurately or incompletely expressed by the words used and it is also equally evident that words had been omitted, these words may be supplied in order that the testator's intention may be given effect: In re Schweigert's Will, 17 Misc. Rep. 186, 40 N. Y. Supp. 979.

The sum of "100." each was construed to mean $100 each, the omitted word "$" being supplied by the court. The court said: "In construing wills, the court may transpose, reject, or supply words so that it will express the intention

of the testator. . . . The meaning of the testator must be ascertained, if possible, however difficult or obscure the language, and it is only after every effort to discover that meaning has failed that the provision can be wholly rejected": Sessoms v. Sessoms, 22 N. C. 453.

Where a will in connection with several legacies, in dollars, contained a bequest of "500," the word "$" was implied by the court: Cooper v. Cooper, 7 Houst. (Del.) 488, 31 Atl. 1043. This case holds that where the words are omitted, they may be supplied to give the intention of the testator full meaning: Gaston's Estate, 188 Pa. 374, 68 Am. St. Rep. 874, 41 Atl. 529.

In this case the will was admitted to probate and parol evidence allowed to interpret it, where the bequests were indefinite and many bequests of money had the dollar sign omitted.

Petitioner Arthur Queyrel seeks to break the force of these cases by claiming that the principles upon which they were decided do not apply here.

In those cases, it is argued, the courts were considering "wills written in the English language by English-speaking people, while here the will is written in the French language by a native of France, who had spent in that country her early and formative years and had lived there more than half her life, coming to this country when well past her majority. Even if the will were otherwise silent, it is apparent that such a person might well think and compute in terms of foreign money, so that, in ascertaining her intention, it would not be obvious that 'dollars' rather than 'francs' are what she had in mind, but here the will contains bequests in both 'francs' and 'dollars.'

"In the Sessoms and Schweigert cases,'dollars'was supplied, not as the result of a choice between 'dollars' and some other word, but because, and only because, the courts did not entertain even a momentary doubt that anything but 'dollars' could have been intended. Here, the will itself is uncertain and incomplete. The context especially in the alleged bequest to Mr. Heurck, makes it likely that 'francs' were intended; opposing counsel claims that, from a consideration of the testatrix' cir-

cumstances, 'dollars' were what she meant. It is clear, therefore, that what the court is asked to do is not (as was done in the Sessoms and Schweigert cases, where the context was such that the omitted word was plain, certain, manifest and unmistakable), to supply an obvious word which had been omitted, but to conjecture what the testatrix would have done had she completed the will, to express that which she has left unexpressed, and thereupon to piece out and complete a defective and imperfect will. This is not to 'construe' the will; it is to make a will."

This argument is ingenious but futile, and does not take in the spirit and substance of the rule laid down with such force and breadth by the authorities.

It is apparent that the testatrix was thinking and computing with reference to her cash in bank in terms of American money so far as the legatees resident in America were concerned. She had long resided here, and it is clearly to be inferred that she meant to give dollars to her brothers Arthur and Eli and friend Heurck here, and francs to her cousin in Grenoble. For these living here she chose the domestic standard, for the one in France the foreign standard. This was natural, and seemed to perfect her purpose of disposing of all of her property, and so it turns out.

It is not difficult to demonstrate this intent and result.

The amount left by her was cash	$3,984.87
Disbursements	868.78
Balance	$3,116.09

the amount to be distributed.

If we accept the view of petitioner, Arthur receives under will, $500; Eli, nothing; cousin in Grenoble, 500 francs, or in American money, $100; Monsieur Heurck, nothing.

Thus by the will, according to this contention, testatrix disposes of only $600, out of $3,116, and is intestate as to $2,516.

If, on the other hand, we conclude that she intended to give dollars to the persons living here and francs to the Grenoble cousin, we have:

Arthur	$ 500.00
Eli	1,000.00
Grenoble cousin 500 francs or	100.00
Monsieur Heurek	1,500.00
	$3,100.00

tantamount to a total distribution, practically no balance remaining, which seems to correspond to her design.

The court is of opinion that to hold that she had in mind any other disposition of her money, would be to violate what is the natural and reasonable intendment of her testament, and that it has the power and that it is its duty to decide that she meant to bequeath to Arthur Queyrel, $500; to Eli Queyrel, $1,000; to the cousin at Grenoble, 500 francs; to Monsieur Heurek, $1,500.

There are other circumstances in evidence, properly cognizable by the court, to support this decision, but it is not necessary to advert to them further than to say that they fortify the conclusion reached after a careful examination of all the points presented.

ESTATE OF CAROLINE H. BAINBRIDGE, DECEASED.

[No. 10,419 (N. S.); 1914.]

Fraud—Pleading—Necessity and Manner.—Fraud is not judicable on implications or inferences; it must be expressly charged in the complaint by direct averment or allegation.

Will—Mental Capacity of Testator—Will Itself as Evidence.—On the question of the mental soundness of a testator, the will itself is evidence in connection with the sworn testimony of the draftsman that the deceased dictated the details to him.

Will—Mental Incapacity of Testatrix—When not Shown.—That a testatrix at the age of eighty-four was incompetent to dispose of her property is not shown by a witness who testifies: "Regarding money matters I formed a very strong opinion that she was in her right mind, for one thing, but in regard to other matters she did not seem to be right. But in money matters she seemed to be very strong."

Will—Dotage on Part of Testatrix—Insufficiency of Evidence.—That a woman in her old age recapitulates in her will her struggle to acquire a competence and expresses gratitude for aid received and a desire to reward through legacies those extending it to her, is not evidence of dotage such as to impair testamentary capacity.

Will—Testamentary Incapacity—Gift to Strangers as Showing.—That a woman of eighty-four by her last will seeks to benefit strangers in blood who have benefited her, instead of leaving all her estate to collateral relatives, does not tend to show that a life-long addiction to drink in excess and other bad habits have impaired her mind.

Will—Undue Influence—Presumption of Exercise.—It is not to be assumed that persons locally far separated from a testatrix exerted a personal undue influence over her or that persons about her exerted such an influence over her in the interest of the absent persons.

Stipulation as to Evidence—Reference to Outside Facts.—Counsel after signing a stipulation to the effect that the statement contains all the material evidence is in no condition to argue that the court should look outside for facts to base its decision upon.

Will—Duty of Testator to Provide for Nephews and Nieces.—An uncle or an aunt is under no obligation to provide for nephews or nieces either when living or by will.

Will Contest—Burden of Proof.—In proceedings to contest the validity of a will the burden of proof is on the person asserting the invalidity.

New Trial—Duty of Court on Motion to Grant.—The trial court is not only authorized but in duty bound, on motions for a new trial, to scrutinize the evidence carefully, in cases where claimed to be insufficient, and to grant new trials whenever, in its opinion, the evidence the decision or verdict was based on is insufficient to justify the conclusion.

Will—Undue Influence—What Constitutes.—A will is not to be set aside on the ground of undue influence unless there is proof of a pressure which overpowered and bore down the volition of the testatrix at the very time the will was made.

MOTION FOR NEW TRIAL AFTER VERDICT.

F. W. Sawyer, for contestant Mary J. Mayfield.

Henry Eickhoff (Lindley & Eickhoff) and Grant H. Smith, for executors.

Eustace Cullinan (Cullinan & Hickey), for certain legatees.

Grant H. Smith and A. G. Kazebeer, for certain legatees.

Burke Corbet and John R. Selby, for Grand Lodge of Masons, Oregon.

S. Bloom, for Roman Catholic Orphan Asylum, Beaverton, Washington County, Oregon.

T. E. K. Cormac, for Rev. Alexander Morrison, legatee.

COFFEY, J. Mary J. Mayfield, describing herself in the complaint of contest as a single person, filed her petition in this court on October 2, 1911, to revoke the probate of a certain instrument established and admitted herein primarily on the fourth day of October, 1910. The contest assailed the validity of the document for reasons set forth in fourteen pages of typewritten statement. After answer made, in due course, the contest came to trial before a jury, and upon the issues framed a verdict was rendered, which issues and verdict are here inserted.

"ISSUES AND VERDICT.

"Was Caroline H. Bainbridge of unsound mind at the time when on the 8th day of September, 1910, she executed the instrument which has been submitted to probate as her last will in the above-entitled matter? YES. C. M. Elliot, Foreman.

"Were the mental faculties of Caroline H. Bainbridge so impaired by old age or by dissipation or by many years of the excessive use of intoxicating liquors or by physical disease or by the results thereof at the time when on the 8th day of September, 1910, she executed the instrument which has been admitted to probate as her last will in the above-entitled matter, that she could not and did not know what she was signing when she signed said instrument and could not and did not know the contents of said instrument at said time? YES. C. M. Elliot, Foreman.

"Was the mind of Caroline H. Bainbridge weak or debilitated or deranged to such an extent as to incapacitate her from making or undertaking a will at the time when, on September 8, 1910, she executed the instrument which has been admitted to probate as her last will in the above-entitled matter? YES. C. M. Elliot, Foreman.

"Was Caroline H. Bainbridge acting under undue influence exerted over her by Eugene F. McCarthy, Edwin C. Gould, and Mrs. Edwin C. Gould, wife of said Edwin C. Gould, or either of them, at the time when, on September 8, 1910, she executed the instrument which has been admitted to probate as her last will in the above-entitled matter? YES. C. M. Elliot, Foreman.

"Did the said Caroline H. Bainbridge, at the time of the signing of the will of September 8, 1910, sign the same under and by fraud of Edwin C. Gould, Eugene McCarthy, Emma Gould, or either of them?

"Answer: YES.

"C. M. ELLIOT, Foreman.
"CHARLES M. ELLIOT.
"WILHELM BOGER.
"VACLAV ZARUBA.
"LAURENCE GLENNON.
"JOHN RUSH.
"THOS. G. JACQUES.
"WILLIAM KEEGAN.
"JOHN NAGELMAKER.
"J. D. BOLGER.

"NO.

"W. W. PARDOW.
"MOSES HELLER.
"WILLARD V. HUNTINGTON."

EXECUTION ESTABLISHED.

1. The execution of the will, according to the statute, was clearly established; there was no evidence to the contrary, and this issue was withdrawn from the jury.

NO ISSUE OF FRAUD.

2. There was no question of fraud raised by the contest and it was judicial error to submit such an issue to the jury.

The counsel for contestant, adverting in his brief to this issue, calls attention to the Estate of Ricks, 160 Cal. 468, 117 Pac. 539, in support of the verdict in this case. But in that case the supreme court remarked that the petition charged both undue influence and fraud. "The contest was based on undue influence and fraud." The fault found with the verdict was the failure to find on the issue of fraud. There were charges in that case of undue influence and fraud, and although they were intermixed, they were susceptible of separation mentally and issuable, in the absence of demurrer; but here there is no specific statutable charge of fraud. The cases are converse, in a sense; that is to say, in the Ricks case the jury failed to find on an issue raised by the plead-

ings, in this case the verdict was found on an imaginary issue, one not tendered nor denied, not joined. There is no copula.

I have carefully examined the complaint and find no charge of fraud, except as implied in undue influence, and these cases are not judicable on implications or inferences.

It is true that there is much matter in the complaint that might be obnoxious to demurrer, or subject to motion to strike out; but that does not relieve the court from obligation to consider only the essential issues raised by the pleadings; and an issue of fraud is not here discernible.

As to the rules of pleading in probate, see Estate of Goodspeed, 2 Cof. Prob. Dec. 146, 148–150.

THE SUBMITABLE ISSUES.

Counsel for contestant contends that it is too late after verdict to raise this point and that respondents having permitted the question to go to the jury are estopped from now suggesting error; that they have waived their right, if any they had; but it is not a waivable point. It is one of fundamental error. It is not a case of bad pleading, which might be corrected or cured by verdict. It is a case of no pleading at all.

WHAT A PLEADING SHOULD STATE.

A pleading should state a litigable issue by direct averment. In the complaint here there is no direct averment or allegation of fraud.

The submittable causes of action are (1) unsoundness of mind and (2) undue influence. In the issues presented there are some variations on the first of these issues that were probably based upon faulty pleading and that should have been eliminated from the form presented to the jury. They are evidentiary in character and, whether justified by the verdict or not, are merged in the main issue.

DUTY AND ACCOUNTABILITY OF THE COURT.

The court itself is accountable for allowing such a form to be used; and it asks no acquittance, because the judge should not abdicate his function of preparing the proper issues to be laid before the jury.

The first issue is that of unsoundness of mind.

Plainly stated, as in the issue presented, Was Caroline H. Bainbridge, at the date indicated in the instrument, of unsound mind?

The complicated paper designated as a petition and contest of Mary J. Mayfield for revocation of probate of will asserts, preliminarily, some negatives pregnant as to execution of the instrument, all of which are a futile dalliance with the main issues.

THE MAIN ISSUES.

The main issues are, to repeat, (1) unsoundness of mind, (2) undue influence; and, dealing with them, according to the pleadings and the evidence, we shall say, first, as to the pleadings, the allegations as to the mechanical execution of the instrument are utterly unsupported by the evidence. There can be no question on that score. Whatever doubt there may be as to its validity otherwise, a more carefully considered and composed document has not come before the court.

If the instrument be of itself evidence, it is shown here that the premises upon which the testatrix predicated her benefactions were entirely and wholesomely rational.

I have said that a more carefully considered and composed document has not come before this court. By this is meant, drawn according to the design of the testatrix. Was it her design? What does the evidence establish, so far as the execution exhibits? The proof as to the execution is perfect. All of the requirements of the law complied with. Not one of the allegations in paragraph III of the complaint was sustained by any sort of evidence. The testimony of the witness Warren was in no wise contradicted. (Statement 2, 3, 247–262.) The testimony of the original probate is in evidence, and, unless palpable perjury has been committed, the decedent dictated the details of the document to the draftsman. If this be so, the paper speaks for itself, and, in copy, is hereunto appended, and a synopsis herein inserted.

THE INSTRUMENT ITSELF AS EVIDENCE.

It is difficult to conceive that such an instrument was the product of a mind impaired by senility or dissipation, or by years of debauchery, "and of something of a worse character." (See page 26, contestant's brief.) What this quoted innuendo means is not clear from the record; but this is clear:

If we are to believe testimony of the witnesses present at the time of the transaction, and if we are to take the instrument itself in evidence, and to accept the statement of the draftsman as to the terms and circumstances of its dictation, the testatrix was capable of fairly and rationally considering the character and extent of her property, the persons to whom she was bound by ties of blood, affinity, or friendship, or who had claims upon her, or who were dependent upon her bounty, the persons to whom, and the manner in which she wished her property to be transmitted: Clements v. McGinn, 4 Cal. Unrep. 163, 33 Pac. 920; Estate McGinn., 3 Cof. Prob. Dec. 43.

There is no impeachment of the subscribing witnesses, although I may here repeat a remark frequently made in this court that it would be better if the draftsman and his associate were not subscribing witnesses.

LAWYERS AND DRAFTSMEN AS SUBSCRIBING WITNESSES AND AS ADVOCATES.

It is at least embarrassing, especially where in a contest, the draftsman and witness as attorney and advocate is called upon to sustain his own handiwork as against shrewd and skillful contestation.

A lawyer can no more be his own advocate than a judge be the trier of a cause to which he is a party. Nor need he be, since there are lawyers in plenty and to spare, particularly in this jurisdiction, for there are eight and more in this case, certainly enough for all practical purposes. Indeed, one was enough for contestant as against the opposing octave, so far as the verdict went.

"In the multitude of counselors there is safety": Proverbs, XI, 14; 24, 6. In this matter it appears that the rule did not work with the jury.

Passing, however, this comment upon the usual local method of attesting wills and omitting any reference to other criticisable circumstances of customary methods, which this court has alluded to in contemporaneous cases, we are to consider the proof as to unsoundness of mind.

The will itself is in evidence, and in light of the rules of law, as laid down by the supreme courts, by the testamentary provisions we may test the sanity of the testatrix. Whatever

her personal history may have been, it is impertinent to inquire, for of this, in absence of evidence, this court has no right to judge and no reason to infer.

THE ELEMENT OF AGE AS TO TESTAMENTARY CAPACITY.

She was a woman far advanced in age, about eighty-four, when the paper propounded was executed. Age is not necessarily an element of testamentary disadvantage. It is sometimes of consequence to the commonwealth to fix a period to official activity and to retire even judicial incumbents at an age arbitrarily fixed; but we all know that some of those judges so sacrificed have done their best work after such enforced retirement. Chancellor Kent improved the opportunity of such a fate by perfecting his commentaries, and others too numerous to particularize have shown that age does not necessarily wither their capacity. Allusions might be made locally, but they are too obvious. In this case the reference to the extreme age of this testatrix as an indication of incapacity might be answered by a witness upon whom contestant seems largely to rely, Chief of Police White. On page 26 of contestant's brief, after a vivid description of testatrix, counsel says "her mind became so weak she was offering her property to any chance acquaintance, the Chief of Police, Mr. White, and others, until she had forgotten the natural objects of her bounty."

MENTAL CAPACITY OF TESTATRIX.

Turning now to the testimony of David A. White, Chief of Police, witness for contestant, what does he say on the score of testamentary capacity? He was not a chance acquaintance. Substantially he had known her for twelve or fourteen years prior to her death; last saw her seven or eight months before she died. In response to a direct question as to her mental condition, Chief White said: "Regarding money matters I formed a very strong opinion that she was in her right mind, for one thing, but in regard to other matters she did not seem to be right. But in money matters she seemed to be very strong."

So it seems she was sound on that issue. This whole case is a matter of money.

In the cross-examination, he said she was very keen-minded about her business affairs; extremely so; crafty about money;

spoke about her money affairs; discussed the different parts of her property; said, at the last time he saw her, that she was going to leave her property to Mr. McCarthy. (Bill of Exceptions and Statement, p. 227.)

PERSONAL HABITS AS AFFECTING MENTAL CAPACITY.

It is argued that the mind of the testatrix was so impaired by a lifelong addiction to drink to excess and other habits obscurely intimated, that at the age of eighty-four she had lost capacity to comprehend her obligations to those who, by nature, were entitled to consideration; and there is much philosophistication in the discussion as to the effect of such a course of life on the mental character.

As an abstract essay on such a subject the brief of counsel is interesting and instructive, not only in reference to this particular point (pages 26–29), but going back to page 15, beginning with line 12, as to the characterization of "dark people" as "born intriguers, schemers, and plotters."

No doubt there is much value in this animadversion, because, necessarily, all such transactions are done in the dark of the moon and cannot stand the noon-day light, and it is perfectly proper that in such a case the sunlight of evidence should be brought to bear upon them, and counsel has been diligent in this direction.

But the testatrix, notwithstanding her imputed infirmities and frailties had lived a long life; she may have been weak and erring morally; she may have been self-indulgent in her youth and in her maturity to an extreme; but she had accumulated a fortune, and what does she say about that in what up to the date of the verdict passed for her autobiography?

If she was a woman of the character insinuated it is not established by the evidence, and this case, as all cases should be, is to be tried by the record.

WHAT IS THE RECORD?

Most importantly, in the first instance, the record is the paper propounded and primarily proved as a will.

As the court reads from the record and from the inspection of the document, its mechanical execution was according to law.

Prior to the instrument now in dispute another paper had been executed in similar circumstances, same witnesses; a few days subsequently, on account of some error, in the first document, a corrected will was signed.

It seems that the testatrix desired a change in a provision and at her instance a new instrument was prepared and perfected. (See pp. 2–6, Statement.) After the change made the paper was engrossed, taken to her room in the hotel which she owned, read to her, signed by her, witnessed twice, first adjacent to her signature, and again after a formal attestation clause; she attached her initials to the margin of each page in the presence of the witnesses. The attestation clause was read to her. (See pp. 247–262, Statement.) There is no contradiction of this testimony.

In the Estate of Ricks, to which counsel for contestant invites the court's attention (p. 4a, Brief), the supreme court alludes twice to the mental character of the testatrix. Mr. Justice Lorigan, always thorough in his treatment of the cases presented to him, leaving no point overlooked, alludes to Mrs. Ricks as a woman of remarkable mental power, although averse to business cares and responsibilities; of decided opinions, perfectly capable of knowing and understanding what she was doing with respect to any matter (160 Cal. 458), a woman of firm will and decisive mind; of remarkable intellectual powers; fully capable of understanding and knowing what she was doing at all times.

"No question is made about her mental capacity at the time the will was executed. There is not a pretense that she was then mentally infirm, and her will, as far as its provisions are concerned, expresses clearly her intention as to the disposition of her property. There is nothing in the will itself which suggests any undue influence in making it": Estate of Ricks, 160 Cal. 462, 117 Pac. 532.

THE TOUCHSTONE OF CAPACITY.

Taking the testament as the touchstone of the capacity of testatrix and accepting as an authority this citation, how does it compare with the contention of contestant?

The will itself shows exquisite appreciation of aid extended to her and service rendered in early days when she was in need or difficulty. It manifests in the highest degree the

quality of gratitude inherent in her character. In the twenty-third clause of the instrument, after she had made her dispository provisions, she declares that she had sought in this her last will and testament to dispose of her property according to her wishes.

"All that I have was earned and saved during many years of hard work. I have during the years of my life received kindnesses and help from persons who are strangers to me in blood, and I have sought in this will to remember them and to indicate to them that I have not forgotten any consideration shown. What property I have is mine, to do with as I believe best, and I have always thought that, in the event of my death, no better disposition could be made of my property than to divide it among those who were kind to me and who need assistance."

If that clause be the emanation of her brain, it is expository of the precedent provisions, and could never have come from a mind diseased or subject to delusion. If she dictated it, or gave instructions to the draftsman tantamount to dictation, it was the product of a healthy mental constitution and signified not only a sound mind but a heart full of gratitude to those who had bestowed favors upon her.

"Gratitude is the fairest blossom which springs from the soul; and the heart of man knoweth none more fragrant."

This clause substantially ends the testament which begins with the usual formal phrases and the declaration that she had no husband, he having died many years before, and no descendants; the only child she ever had died in infancy in New York state many years before, and was buried in Calvary cemetery, a burial place of the Roman Catholic church in New York City; but she knew of a practice often resorted to by designing persons to make claim to relationship by marriage or by descent, and therefore she declared to the world that she had no husband or lineal descendants living.

SYNOPSIS OF WILL.

She then proceeds to make her bequests and gives reasons for each, full and satisfactory, certainly not fanciful, although some may be said to be sentimental. It is worth while to summarize them: To Douglas Ladd, son of R. J. Ladd, formerly of Portland, Oregon, she gives $1,000, in

recognition of many kindnesses shown to her by him during the time when she was sick at the Imperial hotel in that city, where he was bookkeeper and was very kind and considerate to her. To the Fireman's Relief Fund of Portland, $2,000, in recognition of a gallant effort to save her property in that city years before; she had much admiration for the men of that department, with many of whom she had been acquainted. To Seneca Smith, a former judge in Portland, she left $1,000, because he was an old friend for whom she had a high regard. To John B. Cleland, a judge of the superior court of that section, she bequeated $2,000, having a great admiration for him as an honest, upright judge, and she advances a specific reason in this behalf, that at one time some important litigation with regard to property which she owned in Portland was tried by him, and although she had never met him before or since and never saw him except in the courtroom, she was much impressed with his fairness and his desire to do right, and she made this bequest to attest the high esteem in which she held him as an honest judge. To Albert Reiners of Brooklyn, New York, formerly of Portland, Oregon, she gave $2,000, because he was always kind to her and showed her much consideration and did many little services for her; and she further advances as a reason for this bequest that since the fire he had lost his right hand, which prevented him from earning a living at his trade and she did not believe that the amount so bequeathed could be put to a better use. She also gave to him certain certificates of mining stock, making this particular bequest because the shares were purchased by her from him and she desired him to have them back. To Rev. Alexander Morrison, a Catholic priest in Mallow, Cork, Ireland, she left $1,000, because he took care of her mother in her last illness and during the time that she was an invalid; testatrix had a deep respect for Father Morrison and was very grateful to him for the kindnesses that he showed to her mother. To the Grand Lodge of Masons of Oregon she gave the lot in Lone Fir cemetery wherein reposed the remains of Eugene Augustus Cronin and likewise $500 to keep it in order. To the Roman Catholic orphan asylum at Beaverton, Washington county, Oregon, she gave $1,000, because she believed it to be a very worthy institution and desired to assist it in a small way.

To the sisters of the Good Shepherd of Clackamas county, Oregon, she left $1,000, because she believed that the work carried on by them in Clackamas county was a most worthy one which should be encouraged and she desired to help it. To her friends John Slater and Susan B. Slater, his wife, she gave $1,000 each, because they were her tenants for ten years and were very kind to her. Mr. Slater had saved her papers at the time of the fire in April, 1906, and Mrs. Slater had accompanied her to the hospital at that time. Testatrix recites that they have a little mortgage on their home, and are hard-working people, worthy and deserving, and the bequests will be of assistance to them and she knew the money would be put to good use. To Rev. D. O. Crowley she gave $5,000 to be expended by him in such manner as he should deem best for the benefit of the Youths' Directory, which he has fathered. She made this bequest because, while she had never met him personally, she admired the great work in which he was engaged. She gave to her nephew, James Sullivan, of Seattle, Washington state, $1,000; she would have given more were it not for the fact of his being well supplied with this world's goods, and needed no assistance from her. She bequeathed to Patrick Quinlan of Summersworth, New Hampshire, a nephew, $1,000, without assigning any reason therefor. Similarly she gave to Joseph James Quinlan, of Boston, Massachusetts, a nephew, $1,000. To Mrs. Mary J. Mayfield, formerly Mary J. Quinlan, a niece, of San Francisco, $1,000. To Mrs. Annie Turney, formerly Quinlan, of San Francisco, a niece, a like sum. To her friend Herbert B. Keith, an insurance agent of San Francisco, $3,000. All the remainder of her estate to her nephew Eugene Francis McCarthy, the son of her deceased sister, Mary McCarthy. Following these provisions, she directed that in the event of the death of any devisee or legatee before receiving the devise or legacy it should go to those who should inherit the estate of such devisee or legatee. Then she directs that in case any legatee or devisee should contest the will or any of its provisions, such person should take nothing thereunder and the will should be revoked as to such contestant. Finally, her nephew Eugene Francis McCarthy and Stuart F. Smith are named executors without bonds and with full powers. Then

follows the clause explaining the general reasons why she made the dispositions hereinabove summarized.

In nearly all of the provisions she gave specific reasons, but she concluded with the statement already recited.

THE FACULTIES OF THE MIND.

Is it conceivable that the person who dictated and signed that instrument was of unsound mind? We are told that the faculties of the mind are will, memory and understanding. If she made that will as written she demonstrated the possession of all of those faculties.

In the introductory clause to the instrument she says:

"In the Name of God, Amen. I, Caroline H. Bainbridge, also known as Caroline Hannah Bainbridge, being of sound and disposing mind, and not acting under any duress, menace, fraud, or undue influence of any person whomsoever, do make, publish, and declare, this to be my last Will and Testament."

While this is, as has been said, the usual formal phraseology, it may be noted that the entire instrument was read over to her in its first form and in its final correction and engrossment and it must be presumed that she understood the import of its terms. She certainly was an intelligent woman, if not finely educated. She had a reverence for the Deity; a regard for the institutions and obligations of religion; notably recognizant of its benevolent and charitable organizations and enterprises.

NO UNDUE INFLUENCE AS TO BENEFACTIONS.

So far as those objects of her benefactions were concerned, it is not pretended that she was unduly influenced; many of them were far afield from her at the time of the execution of her will; it is absurd to suppose that Douglas Ladd, the Portland Fire Department, Seneca Smith, Judge Cleland, Father Morrison, Albert Reiners, or the other beneficiaries unrelated to her consanguineously or affinitously, had any influence directly or indirectly with her testamentary disposition. She gave a reason showing understanding and strength of memory for each of these bequests. It is not at all likely that there was anyone about her to sharpen her recollection of what they had done to earn her gratitude.

The record does not disclose that anyone even knew why she recalled in such circumstantial minutiae the grounds of her regard for the persons mentioned.

REMEMBERS ALL HER KINDRED.

Nor did she forget her collateral kindred, although they are not necessarily the objects of natural bounty; she remembered every one; she discarded none, although she had a right to discriminate as to their relative equitable or moral claims upon her consideration. It cannot be presumed that a testatrix was of unsound mind because she discriminated against her heirs in the disposition of her estate: Estate of Dolbeer, 3 Cof. Prob. Dec. 232. This is especially true of collateral heirs who have no natural claims upon her bounty: Estate of McDevitt, 95 Cal. 31, 30 Pac. 101.

NOT AN UNDUTIFUL WILL.

This will is not an undutiful will. Not to divide property among nephews and nieces does not make it an inequitable will. An uncle or an aunt is under no obligation to provide for nephews or nieces either when living or by will. Decedent had no descendants, no one for whom a natural duty rested upon her to provide. Nevertheless she did make provision for each and all of the collaterals. So far as the will itself is concerned, it shows a sound sense of equity and ethical ratios.

BILL OF EXCEPTIONS CONCLUSIVE—STIPULATED RECORD.

Counsel for contestant says on page 38 of his brief, lines 21, 22, that the statement in this case does not present all the evidence. This is a suggestion of diminution of the record. It is rather late to make this suggestion in view of a stipulation by all the counsel, bearing his authentic signature, that the engrossed bill of exceptions and statement on motion for a new trial is true and correct and may be settled and allowed to be used on this motion, and it was so settled and allowed by the court. (Statement, pp. 260, 261.)

It should seem that he is now estopped from questioning his own solemn act. The counsel and the court are bound by the record as thus established.

But the counsel makes a rather curious comment in this regard, which, perhaps, the court should notice because of its peculiar character.

"In passing upon this motion for a new trial we are confined to the statement, and if the statement shows omitted evidence, how then can this court say that the omitted portions were not sufficient or contained sufficient evidence to justify the verdict? The jury had this omitted evidence, it passed upon it, it was a part of its consideration; for aught we know it was overwhelmingly in favor of the contestant. Without these omitted portions of the evidence, this court should not attempt to pass upon the evidence as to whether or not it was sufficient to justify the verdict of the jury."

If this be so, there is no sanctity in a stipulation.

MEANING OF STIPULATION.

What is a stipulation? In the Roman law it was a verbal contract and was in that jurisprudence considered the most solemn and formal of all contracts. It was from month to month, *ore tenus;* and, in that sense, in early times at this local bar it was considered as if in writing under seal; that is tradition; but times have changed and now a stipulation is, in practice, an engagement in writing fastened by the signatures of the parties thereto, and even then, in some instances, seems to be repudiable. Once a man's word was his bond, but we have changed all that; and the primitive methods have given way to a condition in which a solemn obligation scripturally incased has no more validity than the vapor of the breath of an inebriate.

The law, however, remains to communicate virtue to the script, and it will not allow the court to exercise its imagination by supplying the alleged omissions in the stipulated statement. This the court cannot do; and in the request there is an implied admission that the agreed statement of evidence does not support the verdict.

BURDEN OF PROOF.

The burden of proof is upon the contestant. This is a truism, and the jury were instructed in stereotyped manner as to what that fixed form of phrase meant. It seems almost an idle ceremony to repeat such so-called instructions.

This court concurs with counsel for contestant in his panegyric upon the jury system (page 31 of Brief), and it is undoubtedly the palladium of the liberties of the people and the safeguard of the state; and anyone, as counsel says, who dares to assail this invaluable popular prerogative will live to regret his vain words. The incivist who has the temerity to criticise this institution has colorless corpuscles instead of red blood in his veins.

It is no argument against the jury system that occasionally a verdict is set aside, any more than it is against the judge that his decision is often overruled; indeed, it may be said that there are more mistrials from judicial error than from erroneous verdicts; and less excuse for them, for the judges are supposed to be specially trained and the jurors come from various avocations not connected with the vocation of the law. It is no impeachment of their integrity, if they be held mistaken in a verdict as to a matter of fact depending on questions of law.

NO IMPEACHMENT OF JURY SYSTEM.

The jury in this case were men of intelligence and the foreman chosen by them was a bright business man, known to the court, and all of them entitled to its respect; but after they had deliberated for hours, and been accorded the opportunity of nourishing their corporal system, they brought in a verdict on one issue only, the first in the series. They were not starved into a verdict; they were not deprived of food or fuel, or given only bread and water; they had been given a generous diet on the American plan, with a soupcon of French, and took ample time to digest their dinner and the issues. In England or Ireland they might have been lectured by the court for their delay; indeed, lately one of the law reports contained severe strictures by the court upon the jury's remissness in occupying an hour and a half in a luxurious luncheon while the judge sat awaiting a verdict munching his crackers and cheese and small beer in his chambers. The chief justice sitting in circuit administered a rebuke which would not be tolerated in this country. Here in this instance when the jury rendered their verdict the court, observing that they failed on all but one issue, was mildly remonstrant at this dereliction and suggested a return to their delibera-

tion room to complete their verdict, which otherwise would have been abortive. Shortly thereafter they returned and found on all issues, by nine to three, as above recorded.

Whether they were vexed at the reproof of the court or not does not, of course, appear; still it may be inferred that the majority of the jurors were not pleased; but passion and prejudice are not to be predicated upon an incident of this kind.

JUDGE'S DUTY ON MOTION FOR NEW TRIAL.

The ideal judge would not have evinced any impatience in such a case; he would have remained impassive, placid, even frigid, not discomposed, but rather decomposed, in such a situation; in a sort of judicial *rigor mortis;* for in our modern system in a jury trial a judge is a nonentity; he has to do nothing but nod; in ruling upon points of evidence he acts almost automatically; as an eminent president once said, he has nothing to do but doze upon the circuit.

It is different, however, when it comes to pass upon a motion for a new trial, as is attested in this case. Then the ideal judge becomes real and he must exert his intelligence and practically act as judge and jury and try the case all over again.

If in such circumstances he is so patriotic as to praise the jury system, it proves conclusively that he has enough of good American blood left in him to declare that that system is the greatest protection in any government of the weak and helpless as against the arrogant attitude of the unthinking and unfeeling possessors of power and wealth.

Counsel for contestant, in his very able presentation of his case, says "the supposed right of the trial judge to weigh the evidence and set aside a verdict because the jury, selected for that purpose, has decided the conflict contrary to his opinion, is a supposed right, if law, unconstitutional"; and, upon this basis, counsel declares that "there is no law and there never was intended to be any law that gives the trial judge this power." (Contestant's Brief, pp. 34–37.)

THE RULES OF DECISION.

In his argument counsel is exceedingly ingenious, and if this were a matter not settled by the supreme tribunal, this

court might find in his favor; but the trial judge must conform to the rules of decision laid down by his superiors.

It may be conceded, for the purposes of this contention, that the law is unconstitutional, and that the appellate court, in usurping the functions of the jury, or the trial court in this class of litigation, is amenable to criticism, but still it is the supreme censor, and, whatever our private opinion may be, we must yield to its judgment.

The code says that a new trial may be granted when there is insufficiency of evidence to justify the verdict: Code Civ Proc., sec. 657.

The supreme court has said in many cases, one for all may be quoted, that it is a well-established rule and often reiterated that the trial court is not only authorized, but it is its duty, to carefully scrutinize the evidence, on motion for a new trial, in cases where the evidence is claimed to be insufficient, and to grant a new trial, whenever in its opinion the evidence upon which the decision or verdict is based is insufficient to justify the conclusion: Lyon v. Aronson, 140 Cal. 367, 73 Pac. 1063.

This is a well-settled rule, that if the verdict is contrary to the weight of the evidence, it is the duty of the trial judge to grant a new trial. The cases are numerous to this point; none to the contrary: Estate of Motz, 136 Cal. 560, 69 Pac. 294.

Counsel for contestant criticises with great power the rationale of these decisions, and undertakes to show that not only the statute falls short of conferring upon the trial judge this faculty of revision and reversal, but that it does not mean what it says, and, in a scholastic manner, he draws the distinction between evidence and proof, and academically argues as to what is meant by that section.

It is not, however, prudent nor expedient for a subordinate court to criticise or question in any manner the decision of its superior. That is the ultimate point of view. "When Rome has spoken, the controversy is ended." The supreme court is infallible, even if it be four to three in the state, or eight to seven in a matter concerning the most important issues of federal interest. This is said seriously and with respect, because otherwise our institutions could not survive. Whatever may be our private or personal opinions, we should

obey without hesitation the decree of the tribunal created by the people through their constitution for their own protection. Hence this court cannot accept the criticisms of counsel for contestant upon the doctrines defined by our courts of last resort. We are not at liberty to discuss the authenticity of their premises or conclusions. A certain distinguished judge of the local superior court, formerly a chief justice, was once congratulated upon the affirmance of his judgment by the appellate tribunal, and he remarked that while it was true they had affirmed his decision, it was upon grounds exactly contrary to the reasons upon which he had based his conclusion; but nevertheless it became the law of the case.

DISTINCTIONS BETWEEN EVIDENCE AND PROOF.

Counsel indulges in some distinctions as to evidence and proof; but the simple rule of our code is that testimony is the evidence given by witnesses, of a certain species, and proof is the effect and result. These terms are technical, but are easily interpreted and understood. It is not necessary here to engage in a discussion as to their differential import. It is sufficient to cite the statute: Code Civ. Proc., secs. 1823, 1824.

Testimony is one species of evidence; but the word "evidence" is a generic term, which includes every species. The word "proof" means, shortly stated, the result of these species. Testimony furnishes evidence; evidence generates proof. Proof means that which convinces the mind of the truth or falsity of the issue tendered. This is hornbook law. No citation needed.

If in this case the evidence fell short of the proof requisite to establish any issue the court should, as to that issue, set aside the verdict; and this court has no doubt, non obstante veredicto, that at the time of the transaction the testatrix was in full form and faculty.

Granting this conclusion, was the testatrix unduly influenced?

WAS THE TESTATRIX UNDULY INFLUENCED.

Is it necessary to recapitulate the evidence? Is there any evidence suggesting undue influence on the part of the main beneficiary? Is there a particle of proof that he exerted

undue or any influence? Gould was not a beneficiary; he may be all sorts of a rogue, but is he interested in this testament? That is the point. Is it established?

Sometimes counsel seem to forget, in this class of cases, where the burden lies, and apparently think that an allegation of itself alone imposes an obligation upon the respondent primarily to establish the contrary, without proof affirmatively; but the rule is otherwise.

It is almost wholly discretionary to grant or refuse a new trial; but no court should exercise this discretion by merely saying "granted" or "denied." Some reason, even if not absolutely required, should be given, in justice to parties litigant; especially where they have expended so much time and energy, as in this case, in elaborating their arguments. Therefore this court has extended an opinion otherwise unduly verbose.

WHERE THE BURDEN LIES.

The authorities are innumerable, indeed it needs no authority, for the statute so says, that the burden of proof is upon the contestant, and it cannot be transferred or shifted: Code Civ. Proc., sec. 1981. The burden is on contestant to establish by preponderance of evidence the issues tendered. This is the law as laid down by the supreme court from the first to the latest of the reports, without the parting of a hair in variation, and it is aided by the legal presumption, if aid were necessary in a proposition so elementary, that every person is of sound and disposing mind and free to act testamentarily, and in a will contest respondents are entitled to such presumption as a matter of evidence. The burden is upon contestant to establish facts from which an inference of undue influence can reasonably be drawn: Estate of Morcel, 162 Cal. 188, 121 Pac. 733.

WHAT IS INCUMBENT UPON CONTESTANT.

It is incumbent upon contestant to show this clearly, that the undue influence alleged operated upon the very act. This proof must be so manifest as to carry conviction and leave no manner of doubt as to the fact.

The unbroken rule is that the courts must decline to set aside a will upon the ground of undue influence unless there be proof of a pressure which overpowered the mind and

bore down the volition of the testatrix at the very time the will was made. There is no such proof here. An attentive hearing and a careful reading of the testimony fails to disclose any evidence tending to show the exercise of undue influence or the commision of fraud. There is a total want of testimony that would justify an inference that any of the beneficiaries undertook to influence the testatrix in any manner whatever.

NO SUFFICIENT BASIS FOR VERDICT.

Undue influence or fraud sufficient to set aside a will must have been perpetrated by or with the connivance of a beneficiary. There is absolutely no testimony in this case in that behalf. So far as the evidence shows, this will was the product of Caroline H. Bainbridge's free and independent volition. Certainly there is nothing to indicate that she acted under pressure which destroyed her free agency. Nothing less than this is undue influence. This is the substance of all the California cases. There is no showing here that the persons benefited had any share in the execution of the will; but it is fully proved that the design of the testatrix in every particular was faithfully accomplished.

It is not necessary to engage in an analysis of the evidence. Without discrediting any witness, or disparaging his sincerity, the result of a careful examination of the testimony, even of the witnesses introduced by contestant, shows no sufficient basis for the verdict.

Courts should be careful of imputing inveracity or even interest or bias to witnesses; they may be mistaken and from the side of the shield that they survey positive as to its color or composition, but they are not necessarily perjurious. They may be a little piqued because they have not been remembered to the extent of their anticipations in the document disputed; they may have mistaken the hospitality of their host as their right to testamentary recognition; and many similar circumstances of disappointment may conspire to infect their own minds as to the mental character of a testator or testatrix; but upon the whole record we must reason out the result; and, in this case, there is no doubt that the evidence was insufficient to support the verdict upon any issue.

Motion granted.

This Case was Affirmed by the supreme court January 26, 1915: 169 Cal. 166, 146 Pac. 827.

For authorities upon the questions therein involved, see Estate of Casey, 2 Cof. Prob. Dec. 68, and notes.

ESTATE OF THEORILDA C. PARK O'NEILL, DECEASED.

[April 30, 1913.]

Undue Influence.—To Show Such Undue Influence upon a Testatrix as must invalidate the will, there must be a preponderance of evidence of such influence operating upon the very act of making the will, and the burden of proof is on the contestant.

Martin Stevens, for the contestant.

Edward Hohfeld, for the proponents.

COFFEY, J. I have reviewed carefully the evidence and argument in this contest. If there be any delay attributable to the court in decision, it has been because of desire to give due weight to every point presented on either side. As the case seemed at the time of submission, the court said then that there was no evidence of improper execution, and no sufficient evidence of unsoundness of mind.

There was but one issue reserved, that is, undue influence; and to the testimony upon this issue the court has addressed its attention diligently with a view to arriving at an absolutely just conclusion upon the charges made by contestant. In the exercise of a liberal discretion the court allowed an amendment to plaintiff's pleading long after the trial had been in progress, so as to present fully and clearly all matters implicating respondent in the charge of unduly influencing testatrix in the testamentary transaction.

The court also gave a free rein to testimony tending to support this charge, believing that it would be better to relax the strict rules of evidence than to exclude inquiry as to facts and circumstances that might serve to demonstrate or to disprove the accusations made by contestant.

In all of this the court has sought to be indulgent because of a natural disposition to reach a judgment that would express the elemental idea of equity, the administration of law according to its spirit rather than its letter; but this dis-

position is restrained by the statutes and the decisions of the supreme tribunals which leave no leeway to the trial courts to depart from the rules prescribed for the conduct and consummation of controversies of this character.

If equity were an arbitrary attribute, then heed might be paid to the plaint that a will is not natural because one bound by blood and cherished by affection is disearded, while another is preferred; but the law says that a person of sound mind and free from undue influence may make an unnatural and even a cruel will.

Howsoever harsh this may be in the sense of natural equity, it is the adjudicated law; and if the testator has acted of his own free will, without undue influence operating upon the very act, the instrument must be sustained; and it is incumbent upon the contestant to prove by a preponderance of evidence that such influence was exerted. The contestant must bear the burden.

Suspicious circumstances, domestic dissensions, marital naggings, overheard conjugal quarrels, temporary estrangements when the wife would not speak to her husband for an hour at a time because he had not let her sleep at night, talking about property, insisting that she should do as he wanted, "she wanted peace at any price," according to counsel, and the price was making a will in his favor, and in her physical condition this was as much coercion as if he pointed a loaded revolver at her head to compel her to sign an instrument for the sake of peace, to secure rest, to obtain freedom from such importunities, with the hope, perhaps, with the reserved hope and thought, perhaps, in her mind, at the proper time, to undo all that at that time she was compelled to do.

"What were those quarrels about during those nights in Denver that resulted in their being not on speaking terms when they arose the next morning? What was the subject, if it was not property? There is no testimony as to any other subject."

This is from the argument of contestant's counsel.

Certainly the court cannot base a conclusion on such conjectural premises.

The court cannot frame findings of fact upon surmises as to what may have been the subject matter of the conversation between husband and wife after they had retired at night,

nor upon what somebody else imagined to be an importunity to make a will. Counsel says there is no testimony as to any other subject; but the question for the court is whether there is any legal affirmative evidence to that effect.

Conceding that there may be some ground for the charge that he exercised influence upon her from time to time, the evidence of execution and the attendant circumstances and the other evidence as to antecedent incidents and facts, giving full weight to all the testimony for contestant, negative the assertion that the testament was procured by undue influence.

The contestant has not established her case by a preponderance of evidence.

The instrument should be admitted to probate as the will of decedent.

Findings and judgment accordingly.

ESTATE OF BERTHA ELLINGHOUSE, DECEASED.

[No. 28,278; January 22, 1906.]

Insane Delusions.—Prejudices, Dislikes and Antipathies, however ill-founded or strongly entertained, cannot be classed as insane delusions.

Insane Delusions.—If One's Mind is Tricked or Deceived into a false opinion, it is played upon, or deluded.

Insane Delusions.—An Insane Delusion is the Spontaneous Production of a diseased mind leading to the existence of something that either does not exist or does not exist in the manner believed—a belief not entertainable by a rational mind, yet so firmly fixed that neither argument nor evidence can convince to the contrary.

Insane Delusions.—In order to Attack Successfully a Will on the ground of insane delusions had by the testator, it must be shown that such delusions operated to cause the production of the will.

Undue Influence.—The Burden of Proof, in the Case of a Will Contest on the ground of undue influence, is on the person contesting.

Undue Influence.—Undue Influence, Such as Invalidates a Will, is something more than mere general influence not brought to bear upon

the testamentary act; it must have been used directly to procure the will and have amounted to coercion, destroying the free agency of the testator.

Undue Influence.—If a Motive or an Opportunity for the Exercise by anyone of undue influence upon a testator is shown, the law will not presume from this that such was exercised, and the showing does not shift the burden of proof.

Undue Influence.—Proof That a Person's Influence Over a Decedent was great would not be proof that it was unlawful or undue, and from the existence of it no presumption would arise of its actual unlawful exercise, even though it had manifestly operated on the decedent's mind in making a testamentary disposition.

Samuel M. Shortridge, for contestants Edward C. Ellinghouse and Emma M. Stone; Louis P. Boardman associated.

Andrew Thorne, for respondent Oscar Ellinghouse.

COFFEY, J. Bertha Ellinghouse died on February 14, 1903, in San Francisco, of which city she was a resident, leaving estate therein, according to the petition for probate filed March 7, 1903. She was a widow, with three surviving children, who are mentioned in the will in contest. That document is here inserted:

"In the name of God, amen: I, Bertha Ellinghouse, of the City and County of San Francisco, State of California, of the age of sixty-six years, and being of sound and disposing mind and memory, and not acting under duress, menace, fraud or undue influence of any person whatever, do make, publish and declare this my last Will and Testament, in manner following, that is to say:

"First—I direct that my body be decently buried with proper regard to my station and condition in life and the circumstances of my estate.

"Secondly—I direct that my executor hereinafter named, as soon as he has sufficient funds in his hands, pay my funeral expenses and the expenses of my last illness.

"Thirdly—I give and bequeath to my daughter, Emma M. Stone, wife of W. R. Stone, of Sacramento, California, the sum of Fifty ($50.00) Dollars, also my diamond pin (containing one diamond), and my watch and chain.

"Fourthly—I give and bequeath to my son, Edward C. Ellinghouse, of the City and County of San Francisco, State of California, the sum of Fifty ($50.00) Dollars.

"Fifthly—I give, bequeath and devise all the rest, residue and remainder of my estate, of every kind and nature, real, personal and mixed, and wheresoever situated and owned by me at the time of my death, to my son Oscar Ellinghouse, of the City and County of San Francisco, State of California.

"Sixthly—I hereby nominate and appoint my said son, Oscar Ellinghouse, the sole executor of this, my last Will and Testament, to serve without any bond or other security being required of him.

"Seventhly—I hereby authorize my said executor to sell all or any portion of my estate, either at public or private sale, and without any order of Court previously had therefor.

"Eighthly—I do hereby declare that the disposition of my estate, as set forth in the foregoing paragraphs, is made after mature thought and consideration, in accordance with my express wishes and desires in the matter, and according to what I think right and just. I do hereby further declare that I make the above disposition of my estate as my own free and voluntary act, while in posession of my full senses, and without any suggestion, intimation, influence, intimidation, duress, menace or fraud on the part of any person whatsoever.

"Ninthly—Should any beneficiary or beneficiaries under this Will contest the probate thereof or contest any of the provisions thereof, or should any beneficiary or beneficiaries under this Will institute legal proceedings looking to the defeat of any of the provisions thereof, then in such event, the beneficiary or beneficiaries so contesting or so instituting legal proceedings shall forfeit all right to any and all bequests, legacies, gifts or devises herein provided, and shall forfeit all right to inherit any property whatever belonging to me. And in the event of such forfeiture I direct that the bequest, legacy, gift or devise so forfeited shall be included in the residuary clause of this my last Will to be disposed of according to law.

"Lastly—I hereby revoke all former wills by me made.

"In Witness Whereof, I have hereunto set my hand and seal, this Fifteenth day of September, One thousand nine hundred and two.

"BERTHA ELLINGHOUSE. (Seal)

"The foregoing instrument, consisting of two pages besides this, was at the date hereof, by the said Bertha Ellinghouse, signed, sealed and published as, and declared to be her last Will and Testament in our presence, and we, at her request and in her presence, and in the presence of each other, have subscribed our names as witnesses thereto.

"J. A. RUSSELL,

"Residing at 2820½ Bush St., San Francisco, Calif.

"H. C. KLOPENSTINE,

"Residing at 1001 Pine St., San Francisco, Calif.

"GEO. H. CHAPMAN,

"Residing at 1001 Sutter St., San Francisco, Calif.

"ANDREW THORNE,

"Residing at 2131 Larkin St., San Francisco, California."

March 19, 1903, Edward E. Ellinghouse and Emma M. Stone preferred a contest to this document on the grounds, shortly stated, of nonexecution according to law; unsoundness of mind; and, undue influence exercised by proponent.

To this contest proponent made answer July 6, 1903, denying specifically all the allegations. The case came to trial on October 19, 1905, without a jury, and continued intermittently until November 22, 1905, when it was submitted.

The burden of proof is upon contestants. The actual execution of the will is clearly established. The controverted issues were unsoundness of mind and undue influence and fraud.

As to unsoundness of mind the evidence that at the time of the testamentary transaction the testatrix was incompetent is insufficient to justify a finding to that effect. The counsel for contestant declares that the nature of the instrument proclaims its falsity, and he dwells with indignation upon the wicked character of the instrument which he says could not have sprung out of the heart guided by a sound mind. The document itself does not demonstrate this theory. The

definition of soundness of mind currently accepted by the courts is to be in full possession of one's mental faculties, free from delusion and capable of rationally thinking, acting and determining for oneself.

A person may be said to be of sound and disposing mind who is capable of fairly and rationally considering (a) the character and extent of his property, (b) the persons to whom he is bound by ties of blood, affinity or friendship, or who have claims upon him or may be dependent upon his bounty, and (c) the persons to whom and the manner and proportions he wishes the property to go.

A partial failure of mind and memory, even to a considerable extent, from whatever cause arising, will not disqualify testator, if there remain (a) sufficient mind and memory to enable him to comprehend what he is about, and (b) ability to realize that he is disposing of his estate by will, and to whom disposing.

In deciding as to testamentary capacity, it is the soundness of mind and not the state of bodily health that is to be considered.

A person's bodily health may be in a state of extreme imbecility, and yet he may possess testamentary capacity; i. e., sufficient understanding to direct the disposition of his property.

Neither old age, distress, nor debility of body incapacitates to make a will, provided there remain possession of the mental faculties and understanding of the testamentary transaction.

The *prima facie* character of a will as just or unjust, equitable or inequitable, is no test of testamentary capacity.

(a) Weakness of mind is not the opposite of soundness of mind; (b) weakness is the opposite of strength, and (c) unsoundness the opposite of soundness.

(a) A weak mind may be a sound mind, (b) while a strong mind may be unsound. (c) Illustration of men of contrasting grades of intellect.

(a) Neither weakness nor strength of the mind determines its testamentary capacity; (b) it is the healthy condition and

healthy action—the even balance—which we denominate soundness.

So far as the language of the will is concerned, it is couched in the highly artificial style of lawyers, but if the idea expressed be that of the testatrix, the fact that she has chosen to make an invidious discrimination against certain of her children is not in itself enough to suggest mental incompetency or import insanity. The will may be in its terms unjust, unreasonable, and even cruel, but if it be the emanation of a sound mind, and if no apparent restraint or undue influence is proved to have induced its execution it must be sustained. Such is the law as laid down by the supreme court. It would be better if controversies of this character were composed without recourse to the courts, but since they are here we must deal with them practically. The evidence for contestant tends to show that decedent was a very nervous woman, excitable in temperament, fretful, and inclined to melancholy, especially after the death of her son, Alfred, to whom she had been tenderly attached, and whom she thought to be still living, and that she was somewhat subject to delusions in this respect. She worried a great deal about him, was much addicted to fretting, and also very sensitive upon the score of her deformity. It appears that she was very small in stature; through some misfortune in birth, or immediately after, she became a hunchback. She was irritable, quick to anger, used to tremble and weep at times, had crying spells, and was at times unconnected in conversation, was notional and changeable, the least trifle would excite her, was forgetful, very weak bodily, susceptible to suggestions and easily influenced. As to one of her alleged delusions, she conceived the notion that someone had obtained entrance to her room and had stolen a clock, stolen something which did not exist, and she complained to the hotel clerk, Mr. Phelps, who tried in vain to reason her out of this belief, but she could not be convinced to the contrary. Testimony to this effect amplified was given by a number of witnesses who knew the decedent at the Hotel Repelier where she boarded for some time, and these witnesses based upon such observations an opinion that testatrix was of unsound mind.

All of this testimony goes to a period sometime anterior to the execution of the will and while the witnesses concluded that she was of unsound mind at times, their reasons appear somewhat inconsistent with that conclusion, and do not point to the time of the execution of the will. As to the clock incident alluded to, Mr. Phelps, the clerk of the Repelier, who had known her as a guest for about a year, considered her very peculiar or unsound, but not until this incident; prior to that *he had not* noticed anything out of the way with her; if, as a matter of fact, however, there had been a clock, he would consider her of sound mind. It appears from the evidence for proponent that there was some reason for her complaint, and this evidence, therefore, is tantamount to an opinion that she was of sound mind. In examining the testimony, it is hard to find from these witnesses a tangible basis for their opinions. Nearly all testify that her mind was at times sound, at other times unsound. Mr. Foster, who conducts the Repelier in conjunction with his wife, says she was physically an invalid, very nervous at times, she was peculiar, a lady he could not understand; when she responded to his greeting, he thought she was all right; when she did not speak to him, he considered her mind affected; he never had any extended conversation with her. Mrs. Foster did not think she was of sound mind, but she fails to give any substantial reason for her opinion except that she was very sick and very nervous. She thought decedent was of sound mind, however, when she spoke of her son's wife and of leaving her property to her children equally, and of Oscar's objection to this disposition. Mrs. Edwards, who had known her a long time, testified that in the first place she was a very bright, intelligent woman—a hardworking and capable woman. Afterward she could see the natural decay coming on. From the time of Alfred's death, from the time she broke up her house on McAllister street, she was entirely changed, because she said she had no longer a home of her own, and the children were all married and gone. She felt that she had not any home and that there was not anything any longer and from that time she became deteriorated and became weaker and sicker; all the way from

the time that Alfred went to Paso Robles Springs she was very weak and sick indeed.

Mrs. Edwards further related one or two incidents to illustrate the change in decedent and said she would describe her actions as actually childish, weak and childish and trembling; just a little bit of a child and when the witness had seen her in the bright mind she had all through life, how quick and active and bright she was, and then noticed the decay come, the gradual decay, it was very perceptible; she could not see; her eyes were very bad; she had no resisting powers whatever, either physical or mental. In connection with this statement of the witness may be considered her answers in direct examination given shortly subsequent to the foregoing. Interrogated as to what she observed as to whether decedent was changeable in her likes and dislikes, whether she had one idea to-day and another to-morrow, she answered, "No, sir. I think she was very firm." Decedent was very unhappy after she broke up her home on McAllister street. She had mentioned to witness that she desired to dispose of her property share and share alike for her four children, and on one occasion when witness took her down to the Beach, they sat down on the sands and talked quite awhile; decedent said there was no use making a will because the four children were her natural heirs and they would have share and share alike. Mrs. Edwards told her she ought to make a will and she replied: "Maybe some day I will do it. The only change I would like to make, I would like to have Ollie, that is Mrs. Stone's daughter, have some little thing, because she is the only granddaughter I have got. "Well," she said, "it seems unjust, for Oscar has had more than any child I have had. All the others had to work very young, but he never had to work young, and remained in school and received his education and graduated, a privilege that none of the others ever had." That was the only difference she made. Now, she spoke of it again at the Repelier when Alfred was away. The same thing was spoken of again. She spoke of Oscar the same way.

The last time this witness saw decedent was on the day of Alfred's funeral and the conversations just referred to were

when he was at Paso Robles about a month prior to his death; decedent seemed to know what she was talking about on those occasions and her mind was perfectly clear. Witness said, in answer to a cross-question, whether she came to court to try to make out that decedent was insane and childish: "Absolutely no. I never said once that she was insane, idiotic or anything of that kind"; she thought, however, that her mind was undermined by her long sickness and trouble; but at the times of the conversations alluded to it was perfectly clear.

She was fond of the theater and was interested in current events. She was always a bright woman and kept in touch with books, all the nice books, and would read anything, a fine mind, very well read; once witness said she would bring her down a book, but decedent answered that it was no use, as she could not read any more; she could not see and could not remember a chapter; she was doing some fancy work, she said it was Alfred's scarf, but she could not finish it; her eyes were very bad. There were times when she worked very hard.

Mrs. Edwards never called at 1306 Polk street and had no knowledge of decedent's condition of mind at the time of the signing of the disputed document.

For aught this witness actually knew of the mind of decedent it was as "perfectly clear" at that time as when she conversed with her concerning the children and said they would share equally in her property.

Mrs. Willetts knew decedent many years and saw her frequently; decedent used to take her to the theater; witness was at her home only twice, but decedent called upon her a number of times and took her to the theater; she was nervous, at the theater she would act very queerly at times, she would not talk to witness probably very much, and she would ask decedent if she had done anything to offend her; the answer was, "Why, no, you have not done anything"; witness said, "Why do you act that way"? and decedent replied, "I just don't feel like talking"; and she would not walk with witness alongside on the street because she was so small and witness was so tall; she said it made her look smaller by walking with witness; she was very peculiar about that; she was sometimes

taciturn, again pleasant, very changeable; she read a great deal, said she read for pastime, but did not remember very much what she read next day after reading the books; witness said to her then that she supposed she found only pastime in going to the theater, and witness remembered what good times they had together; she answered that she didn't remember one play from another; she got them all mixed up and she was not as strong as when witness first knew her; she worried a good deal about Edward because his health was poor, he had worked a good deal on the typesetting machine and his wrist was weak and she did not believe he would be able to support a family; she was very weak, could not hold connected conversation, easily influenced; used to fly from one subject to another; but witness could not give an instance from her experience with decedent on any of these heads; on the contrary it appears from her testimony that she had long conversations, one particularly about a clock, which has been adverted to, although its relevancy to the issues herein is not apparent.

Miss Daisy McKee, a daughter of Mrs. Edwards, knew decedent about fifteen years, she and her mother went to the theater with decedent quite a number of times a week during the time she lived at the Repelier, always in the evening; witness saw her at least once after she moved to 1306 Polk street; she was notional and changeable; not, in all matters, in her right senses; but she could not recall an instance to illustrate her opinion on this point during all the period of their acquaintance, except when she prepared some egg and sherry for her and sometimes she would take it and sometimes refuse and she did not care for it, and another time she was sick and wanted water and when witness procured it she did not take it, and another time she left the theater before the play was over. Many persons leave the theater before the end of the programme without being suspected of unsoundness of mind.

Mrs. Dowell testified that the decedent roomed in her house on Ellis street for about nine months, leaving there shortly before the holidays of 1901, when she went to the Repelier; during that period she saw her every day; she was a very

nervous woman; melancholy; crying and worrying most all the time, she sat up quite late at night watching for her son to come in very often; used to cook in her own room; much confined in her own apartment; worried considerably over her son Alfred's business; her whole heart was set up in that boy; she loved him. Alfred was engaged in theatrical enterprises. She was very affectionate toward her daughter, Mrs. Stone, who came from Sacramento to visit her; they went together to the theaters very often; she seemed to worry a good deal, but was at times very cheerful; she was quite an active little lady; very quick to anger; she said she had given Mr. Stone $4,000 to $5,000 in his business and that he had gone through it all; Oscar used to call to see her about once a week, with his wife; there was no sunlight in her room; she used to do fancy work, which required good eyesight, very fine work; she was very honorable. This is about the purport of the testimony of Mrs. Dowell, and there is nothing in it to authorize a conclusion of unsoundness of mind, even if it were not too remote in point of time to be considered in connection with the issue involved.

Mrs. Elizabeth Ellinghouse, wife of the contestant, Edward, thought that decedent was of unsound mind on September 15, 1902, "simply for the reason of her signing that document," for decedent always said when she was living with her that her children should share and share alike. At such times she knew what she was talking about and was sound. Decedent left the house of witness because she could not sleep on account of the noises in the street from passing vehicles, milk-wagons, there was a dairy across the street and she could not obtain adequate rest; she was subject to insomnia, very excitable, and some incidents were related; witness saw decedent at the Repelier, called there with her husband; she was very much worse in condition, more nervous and thinner, feebler, and her mind was not as good as it had been; did not seem to care to converse with anybody; she would not take notice of her visitors, after the death of Alfred she was worse; cried a great deal; memory not so good as formerly; witness called on her at 1306 Polk street from time to time with her husband; she was far worse there; her strength gave way, used

to complain of her head hurting her so terribly and pain in her head; she remarked several times she thought she was going crazy; witness related an incident in this connection on the occasion of one of her visits when decedent went with her husband, decedent was just going in to her door and when they reached the door she had it locked and witness rapped on the door and went in and decedent stood there just like a person bereft of reason. She had locked the door leaving her visitors on the outside and witness rapped and when they were admitted witness asked her why she locked the door, and she stood still for a moment and gazed around frightened like and said she thought somebody was coming after her, and witness put her arm around decedent and led her over to the couch; this was in the latter part of October; witness continued her visits to the latter part of November; she continued to grow weaker in every way.

The evidence of Edward C. Ellinghouse, one of the contestants, and husband of the last named witness, and son of decedent, is in the main the same as his wife. He visited his mother frequently at 1306 Polk street; in September, and from October, 1902, practically every night until she died and her manner was affectionate and pleasant; he was at no time excluded from her presence; he was not prevented from seeing her alone daily for hours at a time, although his contest asserts to the contrary; she did not tell him that she had made a will, nor anything about the disposition of her property; he used to read the papers to her; as evidence of the insanity of his mother he stated that the mere fact of her signing such an instrument was enough to convince him that she was of unsound mind; but he talked about business matters and about family affairs; about Alfred's estate, and other details too numerous to mention; he repeats that she was nervous, feeble, had hallucinations; witness had not visited his mother from November, 1899, until July, 1902. This might seem to indicate some estrangement between them. He rather reluctantly admitted that when she talked of dividing her property equally among her children she was sane. In reference to the administration of his brother Alfred's estate, about which the witness seemed to be vexed, he testified that Oscar had always

attended to his mother's business affairs. He says his mother was afraid of Alfred and in support of this statement relates one or two instances which do not seem to the court to be conclusive of that fact.

Mrs. Emma Stone's testimony was much to the same effect as her brother Edward's. She testified that her mother was very nervous and very excitable; that the least little thing would make her nervous; that she was troubled with insomnia, but that medicine taken to produce sleep had the desired effect; that she dozed off in the daytime; that she was troubled with a tooth; that she was sensitive as to her physical deformity; that on July 7 or July 8, 1902, she went to the theater with her mother at night; that she went out several times after this occasion with her mother and went to the park; that her mother had said, after Alfred's death, that she wanted to die; that after Alfred's death her mother thought Alfred was still living, and she had said to her: "Why, Emma, here he comes, listen." Her mother had many times told her that she would never make a will and that she wished her children to share equally in her property. The last time her mother said this was on September 12, 1902, and she further testified that at this time, namely, September 12, 1902, she was perfectly sane. At that date her mother knew what she was talking about and her mind was clear and that was the last occasion thaat Mrs. Stone saw her, and yet she testifies that three days afterward her mother was of unsound mind. Mrs. Stone also testified, in regard to undue influence at the time of making the will, that when her mother was living at the Repelier after Alfred's death, she said one day that Oscar was very queer; that he was a peculiar boy and she really could not say that her soul was her own; she was really afraid to say anything because he got so angry and worked up. At the time she said this Mrs. Stone testified that her mother was perfectly sane; she seemed to be sensible; this was three or four days before she moved to 1306 Polk street; she talked in a perfectly rational manner; she was not irrational at all times; there was no suggestion of mental impairment when she last saw her; she was perfectly clear in her mind as to the division of her property

among her children; she exhibited no signs of insanity then at all; that was on the 12th of September, 1902.

Mrs. Stone testified that her mother could not carry on a consecutive conversation, she would drift from one subject to another, and yet it appears from her testimony that she had frequent long talks with her about her affairs; at the time she talked with her about the equal disposition of her property her mind appeared to be sound; it was always her wish and uppermost in her mind that her four children should share and share alike; as to that matter she seemed to appreciate and understand her own wishes. Mrs. Stone said her mother was forgetful, but she could not specify any instance except that at one time she had forgotten where she had put her purse; and another time she went out into the hall and tottered about and could not find her way back, and another time she forgot what she had been talking about; she could not think of any other specific instance. Mrs. Stone testified that her mother was easily persuaded, and the only instance she gave of that fact was that she could persuade her mother to take her meals. Further she said that her mother was susceptible to suggestions, but she could not give an example of such susceptibility.

As to her mother's physical condition, Mrs. Stone said that on her visits to her mother when not living at a boarding house, her mother did all the cooking for herself, for the witness and for the daughter of the witness, and did the housework when Mrs. Stone and her daughter visited Mrs. Ellinghouse.

The testimony of Mrs. Stone relative to the visits of Oscar Ellinghouse and wife to a medium, could have had no effect upon the mind of the testatrix, for the alleged communication from the mother of Mrs. Oscar Ellinghouse was in reference to Alfred being happy, and the second occurrence referred to happened long after the will was executed, so that neither of these instances shows any undue influence or any unsoundness of mind.

When her mother moved to 1306 Polk street, witness was present and made no objection. The witness had never been

forbidden the house on Polk street, had free access thereto and freedom of intercourse with her mother.

Miss Arlie Stone testified that decedent, after her son's death, was under the impression that he still lived, and said, "Why, Alfred is calling me."

This witness further testified that she took decedent on her knee after Alfred's death and bounced her up like a child; that she had read the novel called "The Christian" to her in July, 1902; that she went out with her a while at the Repelier, from July 7 or 8, 1902, nearly up to the time of Alfred's death. This witness testified further that at 1306 Polk street Mrs. Ellinghouse stood at the window and threw a kiss to her and her mother on September 12, 1902. After Alfred's death, the witness swore that decedent said to her: "When I die I want all my property to be divided equally." Miss Stone said that at that time decedent was of sound mind.

It appears that at the time of Alfred's death his mother realized that fact; although she was greatly agitated, she entertained no delusion about that event.

Contestants undertook to establish that the respondent, after the death of Alfred, persuaded his mother against her will to leave the Repelier and to live with him, but the evidence is rather that she went voluntarily and without objection on the part of her other children from a boarding house to the home of her son Oscar.

There are many circumstances which might be cited in addition to those already given to show that the decedent was laboring under mental stress on account of her bereavement. She was troubled and worried, grieved naturally over her loss. Physically she was not strong and had the infirmities incident to age; but the court cannot find, as contestants assert, that she was suffering from and had reached that point denominated senility fully one year before the 15th day of September, 1902, the date of the disputed document. The witnesses for contestant show from their statements of intercourse and association with her during that period that she was at times very active and bright mentally. Witnesses give their opinion that she was unsound in mind, yet at the same time testify that

she conversed with them intelligently and frequently and was at such times rational. She was emotional, excitable, nervous, subject to depression of spirits, but many persons in similar circumstances are so affected and yet possess testamentary capacity. She had had a tooth extracted and endured much pain, complained that her head wastroubled on account of it; but that might well be without resulting in unsoundness of mind. Taken altogether, the testimony for contestants would not warrant a judgment that at the time of the testamentary transaction the testatrix was of unsound mind. It appears after a careful examination of the testimony that these witnesses dealt with her on a basis of her soundness and that their opinion that she was not competent is because of the character of the instrument and its unequal distribution of the property.

Some witnesses testified that her eyesight became bad, and probably as years advanced she could not employ her eyes to the same advantage as formerly, but up to a few weeks prior to her death she read the daily newspaper every day and then her sons read to her; she could see her daughter and granddaughter from the window of her room at a distance; she was an adept at fine needlework and used her hands deftly in that occupation, "she did very beautiful fancy work," she would do a great deal in a short time; this was very trying to the eyes; it required good sight, but toward the end she remarked that her eyes were failing; a little while before she left the Repelier she wore dark glasses and discontinued her fancy work and did not read so much; this statement came from a witness from contestants; but it appears elsewhere in the record that she did not so soon abandon her work or her reading. An examination of the signatures to the will and the other papers would seem to indicate that her eyesight was good; considering her age her name is written in a firm hand and with accurate alignment and the characters are distinctly drawn and unusually legible. In this particular, at least, there is no suggestion of impaired eyesight nor any symptom of mental unsoundness. The testimony for contestants cannot be said to be satisfactory on this issue. On the other, the respondent produces witnesses who testify as to what they observed and what occurred when the document was exe-

cuted. While they were not intimate acquaintances, yet they were qualified by statute and their evidence, unless contradicted or impeached, must be considered as trustworthy, not discrediting others, but weighing it according to the rules of law. The statute provides that there may be adduced in evidence, the opinion of a subscribing witness to a writing the validity of which is in dispute, respecting the mental sanity of the signer; and the opinion of an intimate acquaintance respecting the mental sanity of a person, the reason for the opinion being given. To make the opinion of an intimate acquaintance valuable, the reason should be sufficient; but as we have seen in this case the facts fail to sustain the conclusion of contestants and do not square with the requirements of the law. The opinion of an intimate acquaintance is a qualified one; but that of a subscribing witness is absolute, unless he be shown otherwise to be unworthy of credence.

It does not appear that these subscribing witnesses are discredited in any manner, except by reason of their limited opportunities of observation affording them no sufficient foundation to judge of the mental condition of the testatrix; but since the statute capacitates them to testify, even if they were utter strangers, as to what their senses perceived at the moment of the execution, they have a right to be credited by the court. That is the point of time, and if the decedent were lucid then, when all who saw her testify to her sanity, it overcomes the testimony concerning her aberrations on other occasions, even if that testimony were consistent and uniform, which it is not.

The subscribing witnesses testify in substance, all four of them concurring, that she was of sound mind at the time she signed the instrument. One witness may serve as well as all, because there is no substantial discrepancy as to what occurred in their presence. Mr. Klopenstine saw her sign her name and in his opinion she was of sound mind, his belief being based upon her conduct and conversation. She was asked several questions by another witness, Mr. Russell, and her replies were rational; there was nothing peculiar about her; she had no difficulty in writing her name; the paper was read to her before she signed by Mr. Thorne, who was also a witness,

in a clear, loud voice; he asked her if that was her will after she signed it; she responded "Yes"; he then asked her if she wished these gentlemen to witness the will, and she said "Yes"; and then they signed; there was more conversation of which he had no clear recollection; he had not seen her prior to that occasion, and his opinion was confined to what he observed of her in the course of half an hour; respondent was not in the room at the time, nor his wife, although his wife brought the testatrix into the room when the document was executed.

Mr. Russell, another of the subscribing witnesses, testified to the soundness of mind of testatrix. In the course of a conversation with her at that time she volunteered the statement that the reason why she signed thiswill and gave the property to her son Oscar, was because her other children had not done for her when they were in a position to do anything; that Oscar had always been a dutiful son and had assisted her; the witness asked her some questions and from her answers he formed his opinion as to her intentions and her mental condition; the will was read to her by Mr. Thorne; she said she understood it; there were present the four subscribing witnesses, the decedent and no one else; she was asked by Mr. Thorne if there was any pressure or undue influence brought to bear on her and she said "no"; the will was executed upstairs in the front room, corner of Bush and Polk street. Mr. Chapman's evidence was to the said effect. If she were incapable of making a will, it should seem that some one of these witnesses would have noted some indication of incapacity, but all testify clearly and positively to the contrary.

Neither Oscar Ellinghouse nor his wife was in the room when the testatrix gave instructions for the drafting of her will, the deed and assignment. Neither was in the room when the will was signed. Oscar Ellinghouse testified that he never suggested to Bertha Ellinghouse to make a will, or to sign a check, or to assign the stock, or to make the deed or assignment.

Counsel for contestants comments severely on the transactions by which respondent obtained a conveyance of the

money in bank and the transfer of stock in a building and loan association "as a part of the wicked and unnatural plan and scheme to dominate and control this old and feeble mother," whom he likewise induced to deed to him all her interest in certain real estate, all of which was unknown to his brothers and sister. So far as the deed and assignment are concerned, it appears from the testimony of Mr. Goldner, the notary, that these instruments were acknowledged by her before him on the twentieth day of September, 1902, and that she knew what she was about and was of sound mind. These instruments were signed on the 15th, the same date as the will, in the presence of the same witnesses, who testified that she was of sound mind.

The testatrix told the respondent and told his wife of the fact of having made a will and what disposition she had made of her property, and the testatrix told Mrs. Oscar Ellinghouse when going into the room to sign her will, that she was going into that room to make her will, and after the testatrix came out of the room, she told her that she had made her will. The testatrix knew at the time of making her will the nature and extent of the property of which she was about to dispose, the nature of the act which she was about to perform and the names and identities of the persons who were the proper objects of her bounty and her relations toward them. It appears from the evidence that she conversed intelligently and that she had a good knowledge of every-day affairs, of her property and interests. She certainly had a mind and memory at the time of executing the will competent to deal with and to dispose of her effects among the selected beneficiaries of her bounty. It is not proved that she was at that time the victim of hallucinations or insane delusions, and those that have been testified to concerning her belief that Alfred was alive after his death and the clock incident, assuming that they happened as narrated, did not relate to the will. Such delusions or hallucinations should not affect the making of the will. In considering such a charge, it is important, says our supreme court, to bear in mind exactly what an insane delusion is, and what kind of an insane delusion will justify the refusal of probate to so solemn and important an instru-

ment as a will. Prejudices, dislikes, and antipathies, however ill-founded, or however strongly entertained, cannot be classed as insane delusions, nor is every delusion an insane delusion. Whenever one's mind is tricked or deceived into a false opinion or belief, it has been played upon; it is deluded. But an insane delusion is the spontaneous production of a diseased mind leading to the belief in the existence of something which either does not exist or does not exist in the manner believed—a belief which a rational mind would not entertain, yet which is so firmly fixed that neither argument nor evidence can convince to the contrary. Moreover, such an insane delusion must have operated to cause the production of the will which is under attack.

In relation to the way in which this will came into existence, censorious comment was made by counsel for contestant concerning the conduct of his adversary which authorizes allusion to the explanation of that counsel as to his connection with the case. Mr. Thorne testified that shortly after Alfred died, Oscar called at his office and stated that his mother desired him to apply for letters of administration, and that it was necessary to have someone to represent the estate as it consisted mainly of a theatrical business. Thorne told Oscar that he should apply for special letters and that his mother would have to sign a request for his appointment; the lawyer drew up the request and afterward Oscar brought it to him signed and they went to court and he was appointed special and, subsequently, general administrator.

About a week prior to the 15th day of September, 1902, Oscar came to Thorne's office and told him that his mother desired to see him. Shortly thereafter, and some days prior to the 15th, pursuant to that request, Thorne called upon decedent at 1306 Polk street and was introduced to her by Oscar. Thorne had an interview with her alone, lasting some time, in which she told him that she desired to make her will, what disposition she wished to make of her property and to whom she desired to leave it; she told him that she wanted to make a will as strong as it could be made, so that it could not be broken; that such an attempt would undoubtedly be made and that she desired her wishes carried out; that the reason

that she gave only a small portion to her son, Edward, and to her daughter, Mrs. Emma Stone, was that they had not assisted her when she was in need and when they were able to assist her; the reason that she left practically everything to her son, Oscar, was that he and Alfred had always been good and dutiful to her and had always made provision for her. She told the attorney what property she had, and she fully understood what she had and the objects of her bounty. When the will was prepared, strictly in accordance with her instructions, Thorne asked respondent to have three or four witnesses present at the time of the signing of the same, and thereafter the witnesses appeared at 1306 Polk street on September 15, 1902. The will was carefully read over to testatrix in the presence of all of the witnesses, and the only persons present in the room were the testatrix and these witnesses. The formalities required by law were followed in the execution of the will, and then a deed and assignment read over to her which she signed in the same presence. On the 20th of September, 1902, she acknowledged the execution of the deed and the assignment before a notary public, A. C. Goldner, who explained the documents to her, and she acknowledged to him that she understood their contents and that she had executed them. At the time of the execution of the will the testatrix was asked whether or not any undue influence was brought to bear upon her, to which she replied that there was none and that she signed the document of her own free will. Mr. Thorne said further that when she gave him instructions concerning the instrument, she stated that she had made such disposition of her property as she had disclosed to him as the result of mature deliberation and that it was in accordance with her views as to what she deemed right and just.

If this statement be truthful, all of the transactions were the result of the request of decedent freely and voluntarily made, and respondent did not resort to undue or any influence to accomplish the purpose of depriving his brother and sister of their statutory share of the succession. The burden of proof was upon contestant and it has not been sustained under the decisions of our appellate courts, which lay down the law

that mere general influence, not brought to bear on the testamentary act, is not undue influence; but, in order to constitute undue influence, it must be used directly to procure the will, and must amount to coercion destroying the free agency of the testator. Mere suspicion that undue influence was brought to bear is not sufficient to justify the setting aside of the will.

The law upon this point is plain.

It is urged by contestants that the circumstances lead irresistibly to the inference that respondent controlled the mind of the decedent and dominated her testamentary act. There are circumstances that justify this suspicion and invite inquiry; but the law will not presume undue influence from propinquity; nor does it shift the burden of proof because of what counsel terms "nature's fiduciary relation."

The finding of undue influence must be upon facts proved to the satisfaction of the court. The law will not presume, from the mere fact that there was an opportunity or a motive for the exercise of undue influence, that it was exerted; nor does it presume that undue influence was exercised because of the mental or physical condition of the testatrix; nor because any one of the children was preferred to others and practically excluded from any benefit under the will. The undue influence must be present influence acting upon the mind of the testatrix at the time of making her will, and the exertion of the undue influence upon the very act must be proved. It is needless to repeat here the truisms of the law. Even if it were established here that the respondent had great influence over the decedent it would not necessarily be unlawful or undue, and there would be no presumption of its actual unlawful exercise, merely from the fact that it was known to have existed, and that it had manifestly operated on the mind of the testatrix as a reason for her testamentary disposition. Such influences are naturally very unequal and productive of inequalities in testamentary disposition; but as they are also lawful in general, the law cannot put aside and measure them, so as to attribute to them their proper effect, and no will may be condemned because the existence of such an influence is proved nor because the will contains in itself

proof of its effect. This is the doctrine of our supreme court. In this case there is neither presumption nor proof that the respondent exercised undue or any influence upon the mind of the testatrix at the time of making her will; but there is positive proof that the instrument was the voluntary emanation of her own mind. Upon this point the court must accept the evidence of the unimpeached witnesses to the will. The court is not at liberty to pronounce the draftsman of this instrument false to his oath as a witness nor to his sworn obligation as a lawyer.

In this class of cases the desire of the court is, if possible, to adjust amicably the matter out of court, and it has succeeded sometimes in accomplishing its amiable purpose. If the court had any influence over the parties to this litigation, and if a word of judicial admonition might avail, it would say, "the commonwealth is interested, that there be an end of contention." Application denied.

As to Insane Delusions as impairing testamentary capacity, see Estate of Solomon, 1 Cof. Prob. Dec. 85, and note; Estate of Ingram, 1 Cof. Prob. Dec. 222, and note.

ESTATE OF ERSKINE RICHARDSON, DECEASED.

[No. 6471 (N. S.); November 23, 1910.]

Will—Residuary Bequest Subject to General and Specific Bequests. If there is a residuary bequest made by a will, it is subject to the payment of legacies, both general and specific, and in such case it is unnecessary to determine whether a particular legacy is general or specific.

Will.—A Residuary Bequest in a will is not made the less such by the testator using the words "consisting of" and proceeding to enumerate items going to make up the residuum.

Application for settlement of account of executor and for an order for sale of personal property.

Humphrey & Hubbard, for H. J. Ralston, Executor.

Garber, Creswell & Garber, for widow, Mrs. Gladys Richardson.

Chickering & Gregory, for Dan Erskine Egerton and Seymour Piran Egerton, nephews, legatees.

COFFEY, J. Erskine Richardson died in the city and county of San Francisco, state of California, leaving estate therein, and in the city of Chicago, state of Illinois, and in the state of New York. The decedent left an instrument purporting to be his last will, which was admitted to probate in department No. 9 of the above-entitled court on the 18th day of January, A. D. 1909.

H. J. Ralston, the executor of the will of said decedent, rendered and filed herein an account and report of his administration, as such executor, on the 13th day of December, A. D. 1909, and at the same time filed herein his petition praying that after notice given of the hearing the said court order a sale of such of the personal property of said estate as this court shall designate for the payment of the claims, expenses of administration, and allowance to the widow of said decedent.

Gladys Richardson, the widow of said decedent, filed herein written objections and exceptions to the account.

The testator, although not an attorney at law, was a man of intelligence and education and skill in business, as appears by his accumulation of the estate under administration. That he had some familiarity with legal affairs may be inferred from the manner in which he worded the will. It might have been more formal and elaborate if framed by a lawyer, but it is a matter of notoriety that the employment of the most astute and accurate attorney affords no insurance of invulnerability against successful assault by other attorneys of approved ability.

The will was entirely written, dated and signed by the testator himself.

"San Francisco, September 1, 1908.

"I declare this to be my last will and testament, and hereby revoke the wills I have previously made.

"I bequeath to my nephew Dan Erskine Egerton, 182 shares of stock in the Ralston Iron Works, and 63 shares of stock in the Potrero Foundry.

"To my nephew Seymour Piran Egerton I bequeath 183 shares of stock in the Ralston Iron Works, and 62 shares of stock in the Potrero Foundry.

"To Grace Hall of 1425 Broadway, New York, I bequeath my lute.

"The residue of my property, consisting of money in the Crocker National Bank of San Francisco, and the Illinois Trust & Savings Bank, Chicago, stocks, bonds and notes in Box 94 of the Crocker Safe Deposit Vaults, and in the custody of Jas. H. Oliphant & Co., New York, the furniture of my apartment at 2335 Pacific avenue, and all other property I own, I bequeath to my wife Gladys Richardson.

"I appoint H. J. Ralston of San Francisco, and Floyd W. Mundy of New York, Executors of my estate, and direct that no bonds be required of them.

"ERSKINE RICHARDSON."

It would be difficult even for a lawyer trained in testamentary terminology to express more definitely and concisely his design to dispose of his possessions. He uses the precise words to indicate his legal purpose. He begins by a declaration as to the character of the document and revokes all previous papers of a like nature. In dealing with personal property he uses the apt phrase applicable thereto. He proceeds in logical and legal sequence to designate the shares into which he divides his estate. The decedent at the time of his death owned and possessed the exact number of shares of the Ralston Iron Works bequeathed to his nephews. He did not have in actual possession certificates for the Potrero Foundry stock. He had subscribed to the number of shares bequeathed to his two nephews, but certificates for the same had never been issued by the corporation.

The question is, What kind of bequest was made to each of these nephews?

The construction of this will must determine not only the validity of the objections and exceptions of the widow to the account of the executor, but also includes passing upon the petition for the sale of the personal property of the estate to meet the costs of the administration.

Under the code of California, the legacies are either specific, demonstrative, annuities, residuary, or general:

"Legacies are distinguished and designated according to their nature, as follows:

"1. A legacy of a particular thing specified and distinguished from all others of the same kind belonging to the testator, is specific; if such legacy fails, resort cannot be had to the other property of the testator;

"2. A legacy is demonstrative when the particular fund or personal property is pointed out from which it is to be taken or paid; if such fund or property fails, in whole or in part, resort may be had to the general assets, as in case of a general legacy;

"3. An annuity is a bequest of certain specified sums periodically; if the fund or property out of which they are payable fails, resort may be had to the general assets, as in case of a general legacy;

"4. A residuary legacy embraces only that which remains after all the bequests of the will are discharged;

"5. All other legacies are general legacies": Civil Code, sec. 1357.

The first question then is, Are the legacies to the nephews specific or general?

Numerous cases are cited to establish the proposition that the legacies to the nephews are general rather than specific, but counsel for the widow do not distinguish between the Ralston and Potrero stock. In the one case the certificates for the exact number of shares were in the custody of decedent at the time he made his will. That was, in the language of the Civil Code, a legacy of a particular thing, specified and distinguished from all others of the same kind belonging to the testator. There is no doubt, in the mind of this court, that the legacy of the Ralston stock is specific, and the intention of the testator is equally clear as to the Potrero stock, except

that it may be defeated by the fact that in the latter case the certificates were not yet issued; but in the former there was an actual existence of particular and definite shares of issued stock in the possession of testator at the time of his decease. What he meant is manifested by what he said, but his intention in the one case is executable by the tangibility of the thing bequeathed and nullified in the other by its nonexistence in concrete and separable shape.

There can be no doubt that he designed to make an equal division between his two nephews of his shares in the two corporations, but for the reason suggested his intention fructifies in the one instance and fails in the other.

The interpretation of the will at this time becomes important in determining what property shall be sold to satisfy certain debts of the estate.

Our Civil Code, section 1359, provides the order in which the estate of a testator shall be resorted to for satisfaction of debts. The order provided is:

"1. Property expressly appropriated by the will for the purpose.

"2. Property not disposed of by the will.

"3. Property devised or bequeathed to a residuary legatee.

"4. Property not specifically devised or bequeathed.

"5. All other property ratably."

It will be seen, therefore, that as to payment of debts the residuum must first be exhausted before resort is had to legacies, either general or specific.

Our Civil Code, section 1360, provides the order in which the property of the testator must be resorted to for the payment of legacies. The order prescribed is:

"1. Property expressly appropriated by the will for the purpose.

"2. Property not disposed of by the will.

"3. Property which is devised or bequeathed to a residuary legatee.

"4. Property which is specifically devised or bequeathed."

It will appear, therefore, that in the payment of legacies the residuum must, if necessary, be exhausted before resort is had to general or specific legacies. If the bequest to the

widow be residuary, it is immaterial whether the legacies to the Egerton nephews be general or specific.

The second question is, What is the character of the final dispository clause of the will?

It is contended, on behalf of the widow, that because of the enumeration of certain species of property therein the bequests are specific notwithstanding that testator speaks of "the residue" of his property. This must be considered a residuary clause, inasmuch as he has already attempted to dispose specifically of certain described property and now he undertakes to deal with what is left, the remainder, the residuum, after discharge of liabilities of administration.

There is but one residuary clause. Testator clearly intended that after the satisfaction of the bequests to his nephews the widow should have the remainder. It is needless to cumulate cases on this point. The fact that he undertook to describe of what the residue consisted does not destroy his obvious design: "the residue of my property consisting" and then mentioning certain items, "and all other property I own I bequeath to my wife" clearly exhibits his intent to give her all that remained; the enumeration of these particulars, in view of the comprehensive primal and final clauses of the sentence, does not alter its general character as a residuary legacy. In this clause of the will the testator intended to make the widow his residuary legatee, the same as she would have been had the enumeration been omitted.

ESTATE OF WILLIAM G. IRWIN, DECEASED.

[No. 16,765 (N. S.); March, 1915.]

Will—Charitable Bequest—Mistake in Name of Charity.—A bequest to the "United Charities of San Francisco" will be given effect as a bequest to "The Associated Charities of San Francisco," there being no institution in San Francisco bearing the name "United Charities," it being evident that the testator had in mind a union or association of charitable organizations in the city, but that he mistook the name while retaining the idea.

Words and Phrases—Associated and United.—The terms "associated" and "united" are equivalent, derived from the etymological root, associate, to join or unite.

Application for final distribution; construction of clause in will.

Morrison, Dunne & Brobeck, for executors.

J. F. Shuman and W. I. Brobeck, actually appearing at hearing.

Beverly L. Hodghead, for the Associated Charities of San Francisco.

COFFEY, J. Upon the hearing of this application but one question is raised, and that is upon this clause in the will:

"I do hereby give and bequeath to the United Charities of Honolulu the sum of Twenty-five Thousand ($25,000) Dollars, and to the United Charities of San Francisco the sum of Twenty-five Thousand ($25,000) Dollars. I make no other or further charitable bequests, preferring to leave to my wife as my residuary legatee, and following my custom, the making of such further benefactions as her judgment may suggest."

It is in evidence that there is no institution, association or body politic, social, religious, charitable or other, nor any society, voluntary or corporate, here, or in Honolulu, that answers literally the description of the paragraph hereinabove quoted.

There is, however, in this jurisdiction, an incorporated organization known officially as the Associated Charities of San Francisco, which claims to be the local object of testator's bounty, and petitions the court for distribution of this legacy.

There is no other claim contrary, except that in the memorandum of the widow it is asserted that testator meant exactly what he said, namely, "to the United Charities of San Francisco, Twenty-five Thousand ($25,000) Dollars."

The counsel who makes this statement drew the will, and it is to be presumed that he interpreted the mind of the testator faithfully and translated into testamentary language

his intention. Did he? It is argued by him that the Associated Charities of San Francisco, through its counsel, erroneously assume that testator had in his mind, when he dictated the terms of his testament, one particular institution, and no other; but the widow's advocate contends that there is no foundation for this assumption, and the court has no warrant in accepting the inference that testator made a mistake in his will.

In his memorandum counsel for the widow says that testator made his bequest to the "united charities of San Francisco," the initial letters of "united" and "charities" being in "lower case," in printer's parlance, and that if the clause in question were so written, he asks, Would there be a contention then made that the Associated Charities of San Francisco was the beneficiary intended under the will?

Counsel then proceeds to argue that when testator said "United Charities of San Francisco" he meant all those charities united together which he had been in the habit of donating to in his lifetime.

The grammatical construction of this sentence is somewhat awkward, but we take it that counsel means a combination or group of charities, such as is scheduled in the sworn statement of the widow, in which is included, "Associated Charities of San Francisco."

The clause is, as counsel says, somewhat inartistically expressed, but we may gather its meaning without extraordinary intellectual effort. Testator meant to bestow his bounty upon an actual existent institution which comprehended within the scope of its benevolent activities a unified system of dispensing charity; and testator, or his counsel, mistook for the moment the name, but retained accurately the idea, which was a union or association of charitable organizations formed for the purpose of distributing, without waste, the alms-deeds of their benefactors.

This was the economic essence of the association, and this the motive of those who contributed to its maintenance, and, beyond doubt, the design of the testator.

Extrinsic evidence was properly admitted to point to the fact that there was no other institution in this jurisdiction having any similar purpose; and the accident of misnomer

or misdescription should not be allowed to nullify the design of decedent, which is evident from the context.

The terms "associated" and "united" are equivalent, derived from the same etymological root, associare, to join or unite: Webster's Dictionary.

The institution here was formed for the purpose of joining and uniting, in an incorporated association or union, the various charitable organizations for a common purpose, as stated in the articles of incorporation and by-laws, to conserve their energies and to distribute their means efficiently, so as to do the largest amount of good at the least cost.

Undoubtedly the testator was made acquainted with these purposes and meant by his legacy to subserve and promote them. He intended this association to be his principal charitable conduit and beneficiary, making no other or further charitable bequests, preferring to leave to his wife or his residuary legatee, and following his custom, the making of such further benefactions as her judgment might suggest; but making certain and specific the sum bequeathed to this institution, which, by a corrigible mistake, he misdescribed as the "United" Charities, meaning The Associated Charities of San Francisco, which mistake is here corrected, according to the rules of construction and the authorities, as they are understood by the court.

The authorities cited in support of this conclusion are: In re Gibson, 75 Cal. 329, 17 Pac. 438, affirming 1 Cof. Prob. Dec. 9 (see note to latter on page 12); Speer v. Colbert, 200 U. S. 130, 50 L. Ed. 403, 26 Sup. Ct. Rep. 201; Reilly v. Union Protestant Infirmary, 87 Md. 664, 40 Atl. 894; Jordan v. Richmond Home for Ladies, 106 Va. 710, 56 S. E. 730; Mason v. Massachusetts General Hospital, 207 Mass. 419, 93 N. E. 637; Pope v. Hinckley, 209 Mass. 323, 95 N. E. 798; Bristol v. Ontario Orphan Asylum, 60 Conn. 472, 22 Atl. 848; Woman's Union Missionary Soc. v. Mead, 131 Ill. 33, 23 N. E. 603; Peckham v. Newton, 15 R. I. 321, 4 Atl. 758; Cady v. Rhode Island Children's Hospital, 17 R. I. 207, 21 Atl. 365; Cromie v. Louisville Orphans' Home Society, 66 Ky. 365; Lefevre v. Lefevre, 59 N. Y. 434; Wait v. Society, 68 Misc. 245, 123 N. Y. Supp. 637; Brewster v. McCall, 15 Conn. 273; Cosgrove

v. Cosgrove, 69 Conn. 416, 38 Atl. 219; Trustees v. Peaslee, 15 N. H. 317; Howard v. American Peace Soc., 49 Me. 288; Preacher's Aid Soc. v. Rich, 45 Me. 552; Doughten v. Vandever, 5 Del. Ch. 51; Webster v. Morris, 66 Wis. 366, 57 Am. Rep. 278, 28 N. W. 353; Estate of Donnellan, 164 Cal. 22, 127 Pac. 166.

A Charitable Bequest to "The Old Ladies' Home, at present near Rincon Hill, at St. Mary's Hospital," has been held to have been intended for the "Sisters of Mercy," a corporation embracing, as part of its charitable design, "The Old Ladies' Home": Estate of Gibson, 1 Cof. Prob. Dec. 9.

ESTATE OF FREDERICK ZEILE, DECEASED.

[No. 3370; May 14, 1886.]

Annuity—Protection of Residuary Legatees.—When a testator gives his brother a specified sum per annum, to be paid during his lifetime from the interest of money to be invested by the executors, and directs the principal sum and the overplus interest to be paid to the residuary legatees when the annuity ceases, the investment of the fund should be made with due regard to the interests of such legatees.

Annuity—Investment of Fund.—When a testator bequeaths to his brother a specified sum per annum for life, payable quarterly, the principal sum and the overplus interest thereon to be divided among the residuary legatees when the annuity ceases, the court, in order to provide for the required income, will direct the retention of city real property belonging to the estate and yielding an income slightly in excess of the annuity, rather than direct an investment in United States bonds.

Annuity—Interest and Income.—Where a testator directs his executors to place funds "at interest" to provide for the payment of an annuity, the investment may nevertheless be made in real estate, if such a course seems preferable to the loaning of money.

Interest on Money.—Interest is Only a Synonym for specific income.

COFFEY, J. Decedent bequeathed to his brother $1800 per annum, in quarterly payments, during his life, and directed his executors to place a sufficient sum of money at

interest, well secured, to pay said annuity, and provided, further, that when the annuity shall cease, the capital amount, and any overplus of interest, shall be divided among his residuary legatees. Held:

1. That means should be employed to carry into effect the intent of the testator, to provide an income for his brother during his life, with as little detriment as possible, to the residuary legatees.

2. That although the language of the will is that money should be placed at interest, yet interest is only a synonym for specific income, and the object and intent of the testator was to produce income, and if this can be done better by setting aside property of the estate, or purchasing land, than by lending money, that it would be a narrow and technical construction to refuse to permit it.

3. That it constitutes no objection that property set aside or purchased produces an income a little in excess of the requirements of the annuity, and that this possibility was contemplated by the testator, in providing that the overplus of interest, if any, shall go to his residuary legatee.

4. That in this case, an investment which will bring interest, payable only semi-annually, is objectionable, even if acceptable to the annuitant, as it would involve the payment of interest on the deferred payments of the annuity, and would thus be unjust to the residuary legatees.

5. That United States bonds would be objectionable as an investment to secure the payment of such annuity, in view of the high premium which they command, which would seriously diminish the value of the residuary estate to be distributed within the lifetime of the legatees, and, further, in view of their liability of being called in by the government, prior to the determination of the life estate which would efface the value of the premium, and leave a diminished fund for reinvestment.

Frederick Zeile, died at Monte Carlo, principality of Monaco, in Europe, on April 20, 1884, being at the time of his death a resident of San Francisco, California, and leaving estate therein.

Decedent left a last will, executed in San Francisco, on May 19, 1883, which was admitted to probate on November 19, 1884, and on December 1, 1884, letters testamentary were issued to E. H. Taft, William Sharon and O. Livermore, the executors therein named.

The further facts appear in the opinion.

S. Heydenfeldt, for the executors.

J. B. Reinstein, Wm. Loewy, J. P. Kelly, Selden S. and George T. Wright and Sawyer & Burnett, for the various legatees.

Several of the legatees under the will of the testator, Frederick Zeile, filed their petitions for a partial distribution, and an order was made on the 27th April, ultimo, in favor of most of the petitioners.

Among the number of petitioners was Robert Zeile, who, in the above-mentioned order, was granted a distribution of what was due to him under the will, up to the date of the order.

The further claim of Robert Zeile to have a secure investment of a sufficient sum of money to produce him an annual income of $1800 per annum, payable in quarterly installments, was brought to the notice of the court, by the answer of the executors, and the instruction and order of the court was prayed for in respect thereto.

The question thus raised and submitted has been held under advisement and carefully considered up to the present time.

The clause of the testator's will which provides the bequest is as follows, viz.:

"Item 7th. I give and grant to my brother, Robert, eighteen hundred dollars per annum, in quarterly payments during his life; and it is my will, that my executors place a sufficient sum of money at interest, well secured, to pay the said annuity promptly; and when the said annuity shall cease to become due, it is my will that the said sum of money, with the overplus of interest thereon, if any there be, shall be divided among my residuary legatees, as hereinafter named, or their heirs."

It is suggested in the answer of the executors that as the estate is the owner of a large amount of bonds of the Southern Pacific Railroad Company, the retention by them of a given number of the bonds, as trustees of the annuity fund, would be a sufficiently secure investment, and he suggested a preference for United States bonds.

While yielding to the objection of the legatee, as possibly well founded, I find serious objection to an investment in United States bonds.

One objection which is common to all marketable bonds rests in the fact that the interest is payable on such bonds semi-annually, while the annuity to Robert Zeile is payable quarterly. Even if this were acceptable to him, it would involve the payment of interest upon the deferred payments, which would be unjust to the residuary legatees, and therefore illegal, unless entirely unavoidable.

The special objections to United States bonds are: First, the high premium which they command, which would seriously diminish the value of the residuary estate to be distributed within the lifetime of the present legatees. Second, their liability of being called in by the government for payment, prior to the termination of the life estate, which would not only efface the value of the premium, but would leave a diminished fund in the hands of the trustees, for reinvestment, and possibly at a time when the chances for investment may be more difficult than at present.

These reasons, in my opinion, exclude both of the suggestions for an investment in bonds.

In examining the assets of the estate, I find a piece of real estate in this city, on Jackson street.

The evidence shows that this property produces an income a little in excess of the requirements of the annuity, including taxes, commissions for collecting rents, and other expenses of the trust; and it occurs to me that the retention of this property, or rather its transmission from the executors, as executors, to the same hands as trustees, would be ample security, and would be most apt to carry into effect the intention of the testator, in providing an income for the sup-

port of his brother, during life, with as little detriment as possible to the residuary legatees.

It can be no objection that the language of the will directs money to be placed at interest. Interest is only a synonym for specific income, and the object and intent of the testator was to produce income. If this can be done better by a purchase of land than by lending money, it would be a narrow, technical and unreasonable view to deny it. Nor should it be objected that the income is a little in excess of the amount apparently required. This is liable to happen with any investment, and was contemplated by the testator when he provided that at the cessation of the annuity the sum invested "with the overplus of interest thereon" shall go to his residuary legatees. He knew it was not a case for absolute exactness.

I am the more satisfied with the conclusion I have reached, from the fact that while any loan of money can at the best only return the money at the death of Robert Zeile, the land, in a large and growing city, will, as far as human judgment can estimate, continue to improve in value, so that at the end of the life term the claimants of the remainder will be compensated for the delay.

It may also be considered that the trustees and the trust estate will always be subject to the control of the court, with full power to direct a change of the investment, whenever it can be shown to be to the mutual advantage of all the parties in interest.

It is therefore ordered and decreed that O. Livermore and E. H. Taft, as serving executors of the will of Frederick Zeile deceased, be divested as executors of the tract of land in the city and county of San Francisco, described in the foregoing opinion, and that the same be distributed to, and invested in them, as trustees, to carry out the provision of the seventh item of the last will of the testator.

This order of distribution is rendered, however, upon the condition that the court reserves the power hereafter to direct a change of the investment whenever it shall appear to be for the interest of all the parties concerned.

ESTATE OF MARY A. REDFIELD, DECEASED.

[No. 11,451; October, 1898.]

Interest on Legacy—Code and Common-law Rule.—At the common law, and under sections 1368 and 1369 of the Civil Code, a pecuniary legacy bears interest at the legal rate from one year after the demise of the testator.

Interest on Legacy—Settlement Delayed by Will Contest.—A pecuniary legacy bears interest from one year after the death of the testator, where the settlement of the estate is delayed, without fault of the administrator, by a contest of the will.

J. C. Campbell, Reddy, Campbell & Metson, for contesting heirs.

T. C. Van Ness, Van Ness & Redman, for Francis E. Redfield, administrator cum testamento annexo, and residuary legatee.

W. H. Chickering, Chickering, Thomas & Gregory, for W. G. Hall, former executor, now deceased.

R. E. Houghton, for certain legatees.

COFFEY, J. The question involved in this proceeding is whether the general legacies provided for in the will of Mary A. Redfield, deceased, bear interest at the legal rate of seven per cent per annum from the end of one year after the death of the testator.

Mrs. Redfield died testate on October 4, 1891. The will was admitted to probate; proceedings for the contest of the probate of the same were instituted, and a trial thereof had before the superior court sitting with a jury. Said trial resulted in a verdict and judgment annulling and revoking the probate of said will. A motion for a new trial having been denied, an appeal to the supreme court was taken from the order denying the same. The supreme court reversed said order, and remanded said cause for a new trial. Thereupon said contest to revoke the probate of said will was again tried before this department of the superior court sitting with a jury, and resulted in a verdict and judgment sustaining the

probate of said will. An appeal taken from this judgment was dismissed by the supreme court on the 18th day of August, 1898. On August 26, 1898, Francis E. Redfield, administrator with the will annexed of the estate of said Mary A. Redfield, rendered and filed his final account and filed therewith his petition for final distribution, which said petition sets forth the pendency of said contest as the reason why an earlier application for said distribution has not been made. Upon the hearing of said application, said Francis E. Redfield, a residuary legatee named in said will, objected to the allowance of interest upon the legacies provided for in said will, upon the groundthat the settlement of the estate had been belated by reason of said contest without any fault upon the part of said administrator.

In this contention of said residuary legatee, the court cannot concur.

The rule is well established at common law that all general legacies bear interest at the legal rate from one year after the demise of the testator, even though the condition of the estate rendered payment of the legacy impracticable and the assets of the estate were actually unproductive. This rule is the offspring of another rule which received an early recognition in chancery, the provisions of which allowed to the estate one year, during which time the executor ought to be able to collect and realize the assets and be in readiness to discharge the obligations imposed upon the estate by the will. This latter rule, says Lord Hardwicke speaking for the court in Beckford v. Tobin, 1 Ves. Sr. 380, survived from the ecclesiastical court; Lord Redesdale, in Pearson v. Pearson, 1 Sch. & L. 10, attributed to it a similar origin. But whatever may be the origin of the rule, it is irrevocably fixed as a general rule, and is not now open to controversy: Sullivan v. Winthrop, 1 Sum. 1, Fed. Cas. No. 13,600, 23 Fed. Cas. 371, 375. A pecuniary legacy is to be regarded as a debt due from the estate at the end of one year after the testator's death, and the legatee, when he is entitled to be paid, is in precisely the same situation as a creditor of the estate and should be awarded interest for such time as he is kept out of his demand: Austin's Will, 19 App. Div. 192, 45 N. Y. Supp. 984;

Sloan's appeal, 168 Pa. St. 422, 428, 47 Am. St. Rep. 889, 890, 32 Atl. 42; Hoffman v. Pennsylvania Hospital, 1 Dem. (N. Y.) 118, 122.

"The rule is founded on the principle that interest follows as an incident of, or accretion to the legacy, and not on the principle that the payment is imposed on the executor as a penalty for his default or neglect": Esmond v. Brown, 18 R. I. 48, 49, 25 Atl. 652.

To the same effect are, Welch v. Adams, 152 Mass. 74, 86, 9 L. R. A. 244, 25 N. E. 34; Ogden v. Pattee, 149 Mass. 82, 84, 14 Am. St. Rep. 401, 21 N. E. 227; Kent v. Dunham, 106 Mass. 586, 591; Davison v. Rake, 44 N. J. Eq. 506, 510, 16 Atl. 227. The right to interest grows out of the right to the legacy, and not out of a right for its recovery: Davison v. Rake, 44 N. J. Eq. 506, 510, 16 Atl. 227.

In determining the right of the legatee to interest upon the legacy, the question of the actual posture of the estate is immaterial (Sullivan v. Winthrop, 1 Sum. 1, Fed. Cas. No. 13,600, 23 Fed. Cas. 371, 375, and cases therein cited); neither does the fact that the legacy could not by any diligence be collected affect the right (Ingraham v. Postell, 1 McCord Eq. (S. C.) 94, 98; Welch v. Adams, 152 Mass. 74, 87, 9 L. R. A. 244, 25 N. E. 34; Davison v. Rake, 44 N. J. Eq. 506, 510, 16 Atl. 227; Hoffman v. Pennsylvania Hospital, 1 Dem. (N. Y.) 118, 121); nor whether the assets of the estate are productive or not (Austin's Will, 19 App. Div. 192, 45 N. Y. Supp. 984; Sloan's Appeal, 168 Pa. St. 422, 47 Am. St. Rep. 889, 890, 32 Atl. 42; 2 Williams on Executors, Am. ed. 1895, p. 743; Hoffman v. Pennsylvania Hospital, supra); nor will the residuary legatee be heard to complain.

"The residuary legatees are in no position to complain, for the estate is charged with the payment of the debts and the pecuniary legacies first, and not until this is done is the residue ascertained or the extent of their interest in the estate determinable": Sloan's Appeal, 168 Pa. St. 422, 428, 47 Am. St. Rep. 889, 890, 32 Atl. 42. See, also, In re Williams, 112 Cal. 521, 525, 53 Am. St. Rep. 224, 44 Pac. 808.

It matters not what the obstacle interposed to the due administration of the estate may be, the rule is the same. In

the case of Powell v. Drake, 19 Dist. of Columbia Rep. 334, payment of interest upon the pecuniary legacies was refused upon the ground that the settlement of the estate had been delayed by proceedings to contest the probate of the will without any fault upon the part of the executor, and also upon the further ground that payment of such interest would diminish the residuary estate—a state of facts precisely similar to those in the proceedings at bar—and the court held, and we think properly, that these general legacies bore interest from the end of one year after the death of the testator. At page 338 the court say:

"General legacies are preferred to residuary legacies, and are never to abate in their favor, and will be paid in full though it may exhaust the assets and destroy the claim of the residuary legatees. Neither should interest upon them be denied in favor of those claiming under the residuary clause. . . .

"In the most recent decision of the subject in that state, Budd v. Garrison, 45 Md. 420, Judge Miller says: 'There can be no doubt that a pecuniary legacy bears interest from the time at which it is, by the terms of the will, made payable, and if no time of payment is fixed by the will, it is payable within the time limited by law, and bears interest from that date—that is, from the expiration of one year after the testator's death.'

"The only authority cited in behalf of defendants that really supports their contention is State v. Adams, 71 Mo. 620. In that case a legatee who had contested the will sued the bond of the executor for the amount of her legacy after the will had been established. The court held she was not entitled to interest from the expiration of one year after the death of the testator, but only from the termination of the contest by the establishment of the will. We are at a loss to discover upon what ground this decision can be justified. Possibly the provisions of the Missouri statute (1 Rev. Stats. 111, sec. 2), which declares that no executor shall be compelled to make distribution or pay legacies (except by order of the court) to the widow within two years, unless bond and security to refund be given, may in some way bear upon the

question in that state, but we cannot hesitate to reject it as an unsafe guide, in the face of the overwhelming authority to the contrary in this country and in England. Even if caveators who have put an estate to expense and delay by unjust litigation would be deprived of interest as a punishment for making a contest where there is such a provision in the will, these legatees who are not of the number of objectors to Admiral Powell's will should not be muleted by such loss for the indiscretions or selfishness of others."

This rule of the common law received further expression in In re Bartlett, Petitioner, 163 Mass. 521, 40 N. E. 899; In re McGowan, 124 N. Y. 526, 529, 531, 26 N. E. 1098, and the two cases of Guthrie v. Wheeler, 51 Conn. 208, 212, and Welch v. Adams, 152 Mass. 74, 86, 9 L. R. A. 244, 25 N. E. 34, extend the right to interest to a legatee who has contested the will. The language of the opinion in the latter case is as follows:

"It is without doubt true, that where the settlement of an estate is delayed by legal controversy, and where funds are accumulated under such circumstances that they cannot be permanently invested, loss may be occasioned to the residuum of the estate. The contestant who disputes a will is still, however, in the exercise of his legal rights. It was held, therefore, in Kent v. Dunham, 106 Mass. 586, that the fact that legatees had caused delay by unjustifiable proceedings, embarrassing the executors in the settlement of the estate, was inadmissible for the purpose of defeating their claim to interest": Welch v. Adams, 152 Mass. 74, 86, 9 L. R. A. 244, 25 N. E. 34.

Counsel for the administrator and residuary legatee urged upon the court, in the hearing of the petition for final distribution, that this rule, so firmly established at common law, had been varied in this jurisdiction by the provisions of the statute as contained in the Civil Code, sections 1368 and 1369. The former section provides that "legacies are due and deliverable at the expiration of one year after testator's decease," and the latter that "legacies bear interest from the time they are due and payable." It is urged that the use of the word "payable" in the latter section is indicative of an

intention on the part of the legislature to declare that interest does not commence to run when the legacy is "due and deliverable," viz., one year after the death of the testator, but when the estate is in a condition to pay the legacy. The supreme court has declared in In re Williams, 112 Cal. 521, 53 Am. St. Rep. 224, 44 Pac. 808, that the language of the statute will bear no such construction. The question involved upon that appeal was whether appellant, Mrs. Harvey, was entitled to interest upon a legacy of $10,000, given her by the will of the deceased. An examination of the record in that proceeding will show that the payment of legacies had been postponed by proceedings had for the contest of the probate of the will. Under point 3 of the brief of respondents the precise question raised by legatees in the proceedings at bar was thus presented:

"Was the legacy of appellant due and payable at the end of the year succeeding the death of the testator within the meaning of section 1369 of the Civil Code?"

"Our contention is that as long as the administration of the estate is in such position that the executors cannot be called upon and compelled to pay a legacy, it is not due and payable under the section of the code quoted."

With the issue thus clearly presented for its consideration the court, speaking through Mr. Justice Temple, say:

"It is provided by section 1368 of the Civil Code that legacies are due and deliverable at the expiration of one year after the testator's decease, by section 1369 that they bear interest from the time they are due and payable, and by section 1370 that these provisions are in all cases to be controlled by the testator's express intentions."

"The judgment of the probate court refusing interest is defended on various grounds.

"It is contended that the above direction that the executors need not pay certain named legatees their legacies until it is practicable, having regard to the beneficial management of this estate, is an express declaration that the legacies were not due and payable until the executors shall deem, or the court shall find, that such payment is practicable, having regard to the beneficial management of the estate.

"The first answer to this is obviously that the legacy due appellant is not one of those mentioned, and which it may be claimed may be withheld for the advantage of the estate. To prevent the application of the statutory rule the intention of the testator must be expressed in the will.

"But I think it would not matter if it were admitted that this provision of the will includes all legacies. The code rule is the common-law rule, which was induced partly by reason of public policy. A pecuniary legacy is a debt due from the estate—not a claim against the testator which must be proved and paid in due course of administration, but a claim against the estate imposed by the will. One year is allowed the estate, during which time the executors ought to be able to collect and realize the assets, and be in readiness to discharge the obligations imposed upon the estate by the will. It would be difficult and impracticable to determine in every case when it would be convenient to pay the legacies, and so a general rule has been adopted which cuts the knot by doing what in general cases is convenient, though in particular cases both convenience and justice would be disappointed: Sitwell v. Bernard, 6 Ves. 520.

"So, too, it is presumed that the money is earning something for the estate, which the residuary legatee ought not to be able to get at the expense of the special legatee. To allow this would often involve delay in the administration of estates in the interest of the residuary.

"It is therefore held, in the face of such provisions, that it will be practicable or convenient to pay at the end of one year. This is held even where administration was prevented by contests of the will or in regard to right to administer: Powell v. Drake, 19 D. C. 334; Kent v. Dunham, 106 Mass. 586; Welch v. Adams, 152 Mass. 86, 9 L. R. A. 244, 25 N. E. 34; In re McGowan, 124 N. Y. 526, 26 N. E. 1098. . . .

"The court below is directed to modify the decree appealed from by allowing interest on the legacy of appellant as claimed by her":

In re Williams, 112 Cal. 521, 524, 527, 53 Am. St. Rep. 224, 44 Pac. 808; Haight v. Pine, 10 App. Div. 470, 42 N. Y. Supp. 303, and Vandergrift's Appeal, 80 Pa. St. 116, are

not in point. State v. Adams, 71 Mo. 620, has been rejected "as an unsafe guide, in the face of the overwhelming authority to the contrary in this country and in England," viz., Powell v. Drake, supra.

For the reasons and upon the authorities above set forth, the objection of the residuary legatee is overruled, and interest is allowed as claimed on the legacies from one year after the decease of testatrix.

ESTATE OF CLAUS SPRECKELS, DECEASED.

[No. 6977 (N. S.); October 4, 1910.]

Advancement—Definition.—An Advancement is a Provision made by a donor for a child or other heir during the donor's lifetime, by gift of property on account of the share to which the heir would be entitled as heir after the donor's death.

Advancement—To be Considered Part of Decedent's Estate.—Under the Civil Code any advancement made by a decedent to a child or other heir is a part of the estate of the decedent for the purposes of division and distribution thereof among his heirs, and must be taken by the heir toward his share of the estate.

Advancement—How Created.—Under the code such advancement can be created only by a writing showing an intent of the donor to create an advancement; and such intent must be exhibited in one of three ways: It must appear in the instrument of transfer; or it must be acknowledged in writing by the heir, as an advancement; or it must be charged, in writing, by the donor, as an advancement.

Advancement—Intent—Contemporaneous Writing. — To give the character of an advancement to a gift, the intent must appear by a writing made contemporaneously with the gift. Such character cannot be imparted, ex post facto, by a writing at a later date.

Advancement—Change of Gift to Advancement.—A donor may change an advancement into an absolute gift without the knowledge or consent of the donee, but he cannot change an absolute gift into an advancement without the consent of the donee in writing.

Advancement — Partial Intestacy — Code Changes.—An intent to alter a pre-existing law is not to be inferred from a mere change of phraseology in a revision of prior statutes. Under the English statute, and under the statutes of many states of the Union, the rule is well

settled that the doctrine of advancements is applicable only in cases of total intestacy. An examination of the history of the code and a comparison of code contexts show that the California codifiers did not intend to make such a distinction in the use of the word "intestate" in the old statute, and the word "decedent," in sections 1395–1399 of the Civil Code, as would justify the court in holding that it was the purpose to change the well-settled rule that the doctrine of advancements can be invoked only in cases of total intestacy. Therefore the doctrine of advancements cannot be invoked in cases of partial intestacy.

Advancement—Where a Parent in His Lifetime, had Made Large Gifts to two of his sons, and in his will made several years later, declared: "I make no provision in this will for my sons J. and A., for the reason that I have already given to them a large part of my estate,"—such declaration does not charge such gifts as advancements under the code. Where a donor has made an absolute gift there is no method in which he can make it effective as an advancement short of a legally executed will disposing of his property.

Charles S. Wheeler, Charles S. Cushing, Nathan M. Moran, J. Friedlander Bowie, Oscar K. Cushing, and W. H. Gorrill, for Executors Claus A. Spreckels and Rudolph Spreckels.

A. F. Morrison, W. I. Brobeck, Peter F. Dunne, S. M. Shortridge and W. N. Hohfeld, for Applicants John D. Spreckels and Adolph B. Spreckels.

OPINION.

COFFEY, J. We have here (1) an application by Claus A. and Rudolph Spreckels, executors named in the will of Claus Spreckels, for a final distribution of his estate; (2) an application by two others, John D. and Adolph B. Spreckels, alleged coheirs at law, for participation in distribution; (3) an application by an heir, Claus A., that he have an undivided portion of the property of the deceased; (4) an application by an heir, Rudolph, that he have another undivided portion; (5) an application by the trustees of Emma C. Ferris, nee Spreckels, daughter of decedent testator, that they have for her another portion, and that John D. and Adolph B. Spreckels be excluded from any participation in the division or distribution of the estate of decedent; and (6) an application by Rudolph Spreckels and Claus A. Spreckels, as executors of the will of Anna C. Spreckels, deceased, widow

of Claus Spreckels aforesaid, for the distribution to them of the share to which she was entitled in his estate.

The question in each case is whether by reason of certain circumstances the two heirs at law, John D. and Adolph B., are excluded from participation in the distribution of this estate.

It is contended that the estate must be distributed to Claus A. Spreckels, Rudolph Spreckels and Emma C. Ferris, as the three heirs at law of Claus Spreckels, deceased, because the remaining two heirs at law, John D. Spreckels and Adolph B. Spreckels, have already received, by way of what the law terms "advancements," in excess of the shares that would come to them, if they were otherwise entitled, and if those advancements were marshaled for the purpose of making the distribution.

The sections of the statute cited in support of this contention are as follows:

"Sec. 1395, Civil Code. Any estate, real or personal, given by the decedent in his lifetime as an advancement to any child, or other heir, is a part of the estate of the decedent for the purposes of division and distribution thereof among his heirs, and must be taken by such child, or other heir, toward his share of the estate of the decedent.

"Sec. 1396, Civil Code. If the amount of such advancement exceeds the share of the heir receiving the same, he must be excluded from any further portion in the division and distribution of the estate, but he must not be required to refund any part of such advancement; and if the amount so received is less than his share, he is entitled to so much more as will give his full share of the estate of the decedent.

"Sec. 1397, Civil Code. All gifts and grants are made as advancements, if expressed in the gift or grant to be so made, or if charged in writing by the decedent as an advancement, or acknowledged in writing as such, by the child or other successor or heir."

It is argued that this question would be readily resolved by a reading of these sections, for they declare in terms unmistakable what shall be done where advancements have been made, and in this case, it would appear that the amount

advanced exceeds the share of the two sons, John D. and Adolph B.; they have received it and it may not be reclaimed; but, if it has been by way of advancement, they are not entitled to participate in this distribution, and the three other children are entitled to the whole estate.

If the applicants, John D. and Adolph B. Spreckels, have received their share by way of advancement they are precluded from participating in this distribution. By the antecedent action of the testator they are disentitled to a distributive interest at the end of the administration of his estate. An "estate" is what a man leaves upon his decease; property which a person leaves to be divided at his death; "see what a vast estate he left his son"; and the decedent here left an enormous estate to be divided among his children. By the terms of his testament he devised his estate in trust to certain of his children; by the fourth paragraph he expressly excluded other children from sharing in distribution. "I make no provision in this will for my sons John D. and Adolph B. Spreckels for the reason that I have already given to them a large part of my estate." Here is a distinct reference to his estate and it is urged that no better language could have been used for the purpose of satisfying the statute as to advancements, which says that "all gifts and grants are made as advancements, if expressed in the gift or grant to be so made, or if charged in writing by the decedent as an an advancement."

Herein lies the whole question: What is it to charge as an advancement? Counsel have traversed history from the time of the Merry King to the prosaic present to acquaint us with the law of advancements.

It is essential, say counsel, to go into the history of this law in order that the court may arrive at an understanding of the code sections cited and quoted. History is philosophy teaching by examples; so we must learn, according to argument, from the cases what the statute means. Counsel claim that the spirit of the statute of Charles II is imported into our codes, that we use the term "advancement" in much the same way that it was then used, in the years of grace 1671–1672, and that our law is based substantially upon that stat-

ute, modified in different states, but having its parentage in the time indicated, and, turning again to our California code, it is asserted that we use the term much in the same way that the English statute does. It is insisted that the spirit of the Statute of Charles II is incorporated into our present code—reincarnated as it were.

To illustrate this argument may be inserted the quotations made from this appendix to Thornton on the Law of Advancement:

"All ordinaries and every other person who by this act is enabled to make distribution of the surplusage of the estate of any person dying intestate, shall distribute the whole surplusage of such estate or estates in manner and form following; that is to say, (2) one-third part of the said surplusage to the wife of the intestate, and all the residue by equal portions, to and amongst the children of such persons dying intestate, . . . other than such child or children . . . who shall have any estate by the settlement of the intestate, or shall be advanced by the intestate in his lifetime, by portion or portions equal to the share which shall by such distribution be allotted to the other children to whom such distribution is to be made; (3) and in case any child, . . . who shall have any estate by settlement from the said intestate, or shall be advanced by the said intestate in his lifetime by portion not equal to the share which shall be due to the other children by such distribution as aforesaid; then so much of the surplusage of the estate of such intestate, to be distributed to such child or children as shall have any land by settlement from the intestate, or were advanced in the lifetime of the intestate as shall make the estate of all the said children to be equal as near as can be estimated."

Following this, by way of comparison, to show parentage of our statutory provisions and transfusion of idea, we have the language quoted from our Civil Code, section 1399, and others cited:

"If any child or other heir receiving advancement dies before the decedent. . . . "

"If the estate so advanced . . . or gifts are made as advancements. . . . "

"If the amount of such advancement exceeds the share of the heir receiving the same. . . . "

"Any estate, real or personal, given by the decedent in his lifetime as an advancement."

And also section 1309: "If such children, or their descendants, so unprovided for, had an equal proportion of the testator's estate bestowed on them in the testator's lifetime, by way of advancement, they take nothing in virtue of the provisions of the three preceding sections."

An advancement, in law, is defined to be a provision made by a parent for a child during the parent's life, by gift of property on account of the share to which the child would be entitled as heir or next of kin after the parent's death: Century Dictionary.

Money or property given by a father to his child or presumptive heir, or expended by the former for the latter's benefit, by way of anticipation of the share which the child will inherit in the father's estate and intended to be deducted therefrom. It is the latter circumstances which differentiates an advancement from a gift or a loan.

Advancement, in its legal acceptation, does not involve the idea of obligation or future liability to answer. It is a pure and irrevocable gift made by a parent to a child in anticipation of such child's future share of the parent's estate: Yundt's Appeal, 13 Pa. St. 580, 53 Am. Dec. 496.

An advancement is any provision by a parent made to and accepted by a child out of his estate, either in money or property, during his lifetime, over and above the obligation of the parent for maintenance and education: Ga. Code 1882, sec. 2579; Ga. Civ. Code 1895, sec. 3474.

An "advancement by portion," within the meaning of the statute, is a sum given by a parent to establish a child in life (as by starting him in business), or to make a provision for the child (as on the marriage of a daughter): Taylor v. Taylor, L. R. 20 Eq. 155; Black's Law Dictionary.

"Advancement" has been defined to be that which is given by a father to a child or presumptive heir by anticipation of what he might inherit: Hattersley v. Bissett, 50 N. J. Eq. 577, 25 Atl. 332.

All gifts and grants are made as advancements, if expressed in the gift or grant to be so made, or if charged in writing by the decedent as an advancement, or acknowledged in writing, as such by the child or other successor or heir: Utah Rev. Stats. 1898, sec. 2843; Okla. Rev. Stats. 1903, sec. 6907; N. D. Rev. Codes 1899, sec. 3754; S. D. Civ. Code 1903, sec. 1106; Idaho Civ. Code 1901, sec. 2545; Mont. Civ. Code 1895, sec. 1863; Mich. Comp. Laws 1897, sec. 9072.

According to the decisions under the English and similar American statutes, the ancestor must have died intestate in order to make a gift an advancement: Grattan v. Grattan, 18 Ill. 167, 170.

The idea of the rule is said to be to maintain equality among the children; it is the great moral and equitable principle of equality; that was the purpose of the statute of Charles II, but that statute did not require a charge of expression or acknowledgment in writing, and it might be that under the English rule the transactions in question here would be considered advancements while the contrary would be the case under our code, unless it be found that there is proof of a charge in writing according to the terms of our statute.

Every advancement is a gift, but the converse is not true—every gift is not an advancement. To make the gift an advancement it must be charged as such in writing. The intent to make the gift an advancement is, under our statute, conclusively presumed from the written charge, and this intent is exhibited in any one of three ways: It must appear in the instrument of transfer itself; or, it must be acknowledged in writing, as an advancement, by the child, or, it must be charged in writing by the donor as an advancement. When must this charge be made and in what circumstances will it be deemed sufficient? It is contended, by one side, that the writing need not be contemporaneous, and that no precise form of words is necessary to make the gift an advancement or that any written words by the donor evidencing an intention upon his part that that which he has given shall stand as a provision out of his estate for one of his heirs at law will comply fully with all of the demands of the statute in that regard. The

word "advancement" owes its origin to the design of the decedent to "advance" the prospects of his children in life, and decisions are cited from Massachusetts and Michigan as apt in their application to show that the writing need not be made at the time of the transfer and that it need not even be signed. Bulkeley v. Noble, 19 Mass. 337. It may be credited as a charge in a book of accounts, subsequent to the transaction. This was held to be in conformity with the statute directing what shall be evidence of an advancement in case of an estate: Paine v. Parsons, 31 Mass. 318; Bigelow v. Poole, 76 Mass. 105. In Michigan like doctrine was declared: McClintock's Appeal, 58 Mich. 152, 24 N. W. 549; Power v. Power's Estate, 91 Mich. 587, 52 N. W. 60.

Counsel says that Michigan is the direct parent of our statute and Massachusetts the grandparent; both the Michigan and the California statutes are of common origin. Therefore the construction of the courts of those states is authority. So that to all intents and purposes the section of the code of California under consideration, so far as the precise point here is concerned, has come to us with its interpretation placed upon it, and the cases cited from those states are controlling upon the proposition that the writing need not be contemporaneous; their statutes do not reequire it and our statutes are similar. In Maine the statute was copied from Massachusetts and the decisions are consonant in construction: Porter v. Porter, 51 Me. 376; Smith v. Smith, 59 Me. 214. The statute is determinative of the character of the evidence—it is exclusive of all other evidence; that is the inexorable nature of the law; consequently it may not be aided by oral testimony. An oral statement or declaration is in no sense evidence of the character of the transaction. The writing is the sole evidence and governs and signifies the nature of the gift: Doty v. Willson, 47 N. Y. 583. It is claimed, therefore, that as we inherit our statutes from Massachusetts, Maine, and Michigan, we are bound by the construction of their courts to the conclusion that the writing need not be contemporaneous, and that any writing of the decedent which sufficiently manifests the intent that the property theretofore made over to his sons John D. and Adolph B. should stand as a provision for them

out of his estate, and is a sufficient compliance with all that the statute demands.

It is conceded by the same counsel that there is a somewhat similar statute in Illinois, but he asserts that it differs from ours in certain essential particulars. In Massachusetts and in Michigan the language is similar, "All gifts or grants shall be deemed advancements which are made in compliance with certain requirements, of which three are named, while in Illinois the statute says that "No" gift or grant shall be deemed an advancement unless it is in one of these three forms. Here is seemingly a distinction without a difference, but counsel says that the essential difference between the two statutes is obvious; that one enlarges, the other restricts. Emphasis is laid upon this difference, because within a comparatively recent period the supreme court of Illinois has held that there must be a contemporaneous memorandum, but counsel contend that that decision cannot affect this case because it is not our statute, and, if it were, the Illinois statute would not concern us, for Massachusetts had already impressed a character upon the statute agreeable to our legislature before the contrary decisions were rendered. Wisconsin, also, it seems, had held that its statute requires a contemporaneous writing, and its language is identical with our own, but it is argued that this is no authority, because it is adverse to the ruling of the supreme court of California: Estate Tompkins, 132 Cal. 173, 64 Pac. 268. It is said that the Wisconsin case is in the teeth of this decision. In the California case decided March 11, 1901, the court said: "If the donor desires that an absolute gift be charged up against any portion the donee will receive at his death, if he die intestate, the only way he can secure the accomplishment of his desire is to execute a will directing that the value of such gift shall be charged to the donee in the final distribution and that his portion shall be reduced by that amount."

In the Wisconsin case it was decided, May 10, 1904, that to constitute an advancement it must be given that character at the time of the transaction by a declaration in the writing making the bestowal, or by an acknowledgment in the same manner simultaneously by the recipient of the bounty, or by

an expression of the donor in respect to the matter in charging the property to the recipient: Ludington v. Patton, 121 Wis. 651, 653, 662, 99 N. W. 614. In that case the testator charged in his books, and so stated in his will, certain gifts as advancements, but the court declined to adopt this act as a statutory advancement, saying that it could not be so considered unless that character was conferred upon it at the time of delivery.

In another Wisconsin case, decided May 24, 1910, pending the discussion in the case at bar, Arthur v. Arthur, 143 Wis. 126, 126 N. W. 550, the court said, in the course of its opinion, that it saw no reason to depart from the conclusion reached in the Ludington case, and it adhered to the construction therein established that the manifest purpose of the statute in making the charge in writing evidence of an advancement was that such charge must be made contemporaneously with the advancement.

In order to appreciate the respective arguments upon these statutes and their application to this case, it may be well at this point to insert samples:

California: Statutes of 1850, pages 219, 221, section 7: "All gifts and grants shall be deemed to have been made in advancement, if they are expressed in the gift or grant to be so made, or if charged in writing by the intestate as an advancement, or acknowledged in writing as such, by the child or other decedent."

Civil Code, section 1397: "All gifts and grants are made as advancements, if expressed in the gift or grant to be so made, or if charged in writing by the decedent as an advancement, or acknowledged in writing as such, by the child or other successor or heir."

Illinois: Hurd's Revised Statutes of Illinois of 1880, pages 421, 422, section 7: "No gift or grant shall be deemed to have been made in advancement unless so expressed in writing, or charged in writing by the intestate, as an advancement, or acknowledged in writing by the child or other decedent."

Maine: Revised Statutes of Maine of 1871, page 567, section 5: "Gifts and grants of real or personal estate to a child or grandchild are deemed an advancement when so expressed

therein, or charged as such by the intestate, or acknowledged in writing to be such."

Massachusetts: Revised Laws of Massachusetts of 1902, volume 2, page 1291, section 6: "Gifts and grants shall be held to have been made as advancements if they are so expressed in the gift or grant to be so made, or if charged in writing as such by the intestate, or acknowledged in writing as such by the party receiving them."

The original statute of Massachusetts of 1805 differs in some respects from the present statute above quoted.

See the statute cited in the case of Whitman v. Hapgood, 10 Mass. 437, where it is quoted in the statement of the case as follows:

By Statutes of 1805, chapter 90, section 3, it is enacted: "That all gifts and grants made by the intestate, to any child or grandchild, of any estate real or personal, in advancement of the portion of such child, etc., and which shall be expressed in such gift or grant, or otherwise charged by the intestate in writing, or acknowledged in writing by the child or grandchild as made for such advancement, such estate, real and personal, shall be taken and estimated in the distribution and partition of the intestate's real and personal estate, as part of the same; and the estate so advanced shall be taken by such child or grandchild, towards his share of the intestate's estate."

Michigan: Compiled Laws of 1871, volume 2, section 4317: "All gifts and grants shall be deemed to have been made in advancement if they are expressed in the gift or grant to be so made, or if charged in writing by the intestate as an advancement, or acknowledged in writing as such by the child or other descendant."

Vermont: Vermont Statutes of 1894, section 2560: "Estate, real or personal, given by the intestate, in his lifetime, to a child or other lineal descendant, shall be reckoned toward the share of such child, and for that purpose shall be considered a part of the estate of the intestate. But such estate shall be deemed to be given in advancement only, when in the gift or grant it is expressed to be in advancement or is for the consideration of love and affection; or when such estate is

charged as such by the deceased in writing; or when such estate is acknowledged as such by the heir in writing; or when personal estate is delivered expressly as advancement before two witnesses requested to take notice of it."

Wisconsin: Revised Statutes of 1858, page 555, section 8: "All gifts and grants shall be deemed to have been made in advancement if they are expressed in the gift or grant to be so made, or if charged in writing by the intestate as an advancement, or acknowledged in writing as such by the child or other decedent."

These suffice to show similarities and verbal variations, retaining substantial identity.

From a comparison of these statutes it would seem that there is no material change of phrase in any; there is evidently a common parentage. The only departure from the common form is in the Illinois statute, and that expresses negatively what the other declares affirmatively. Illinois says that "*no* gift *or* grant shall be deemed to have been made in advancement"; Michigan, for instance, says that "*all* gifts *and* grants shall be deemed to have been made in advancement," and opposing counsel hang upon the eyelids of this textual variance a disputation as to the application of the authorities, elevating to the height of a great argument as to whether the same proposition stated in affirmative and negative terms imports a radical distinction in essence. It is difficult to discern the distinction drawn by counsel upon this turn of a phrase. The statutes of California enacted in 1850, of Michigan, and Wisconsin, are word for word the same, Illinois is substantially identical; the California Civil Code substitutes the word "decedent" for "inte tate" but makes no other material change in verbiage and none in sense. The statute of 1850 was taken literally from the Revised Statutes of Massachusetts of 1836. Michigan in 1847 copied the latter. California followed suit. That seems to be the sequence. Massachusetts is the progenitor. The other states are her statutory children. From this it is argued that the cases in Massachusetts and Michigan are controlling that the writing need not be contemporaneous, since the statutes in those states do not require it and our statutes are the same. So also are

they in Illinois and Wisconsin, where the courts have decided that the written charge must be simultaneous with the gift; but it is contended that the Illinois statute is different from ours, is later in date, and in conflict with the interpretation placed upon our statutes before we adopted it, and that the Wisconsin cases are in conflict with ours: Estate Tompkins, 132 Cal. 174, 64 Pac. 268. As to the asserted difference between our statute and that of Illinois, this court has already stated its inability to perceive wherein they differ. So far as Illinois is concerned, assuming the similarity of the statutes, it is opposed to the theory of advancement: Wilkinson v. Thomas, 128 Ill. 366, 21 N. E. 596.

In the Wisconsin case, cited in the oral argument, where the statute was identical with ours, the testator charged in his books and so stated in his will certain gifts as advancements, but the court decided that that was not a statutory advancement. It refused to adopt the contention of counsel upon this proposition, and said that the statute clearly contemplated that a delivery of property by one to another, the latter having claims upon "the former's bounty, is not to be deemed an advancement unless it is given that character at the time of such delivery, either by declaration in the writing making the bestowal, or by an acknowledgment in writing at the time by the recipient of the bounty, or by an expression of the donor in respect to the matter in charging the property to the person receiving the same: Ludington v. Patton, 121 Wis. 651, 99 N. W. 614."

In the other Wisconsin case published since the oral argument the main authorities relied upon here are considered and the conclusion reached that the charge in writing must be made at the time of the delivery of the property. The court said that the manifest purpose of the statute in making the charge in writing evidence of an advancement was that it should be contemporaneous: Arthur v. Arthur, 143 Wis. 126, 126 N. W. 550.

This case refers to the Massachusetts citations, remarking that the statute of that state is the same as Wisconsin and has been construed by the courts of the latter state contrary to the contention of the counsel for executors and devisees in

the case at bar. It cites many authorities relied upon here, and concludes that the cases from other jurisdictions are in harmony with the decision and that the construction placed upon the statute by the Massachusetts court has been adopted by Wisconsin. I have considered the criticisms of counsel for executors upon this latest opinion of the Wisconsin court that it does not cite or quote cases from other jurisdictions directly to the point that the statute does not require a contemporaneous charge, and that it entirely ignores the very potent analogy offered by the statute of frauds for the construction of this statute of advancements and makes no investigation into the Massachusetts cases, which had from the first held that the writing need not be contemporaneous; but the decision seems to have examined those cases and to have followed them to the point indicated, saying that in the Pomeroy case, "after reviewing the Massachusetts case under a similar statute, it is held that parol evidence is inadmissible to prove an advancement, and that all other evidence than that prescribed by the statute is excluded by implication. And in the Ludington case it was held that the charge in writing must be made at the time of delivery of the property. The court said: 'The statute is mandatory and must be enforced as written: Pomeroy v. Pomeroy, 93 Wis. 262, 67 N. W. 430. It clearly contemplates that a delivery of property by one to another, the latter having claims upon the former's bounty, is not to be deemed an advancement unless it is given that character at the time of such delivery, either by a declaration in the writing making the bestowal, or by an acknowledgment in writing at the time by the recipient of the bounty, or by an expression of the donor in respect to the matter in charging the property to the person receiving the same.' "

It said further, that it was unnecessary to go outside of its own decisions for the Pomeroy and Ludington cases were decisive of the propositions involved; but, nevertheless, it did examine and consider those cases from other states having similar statutes, including Massachusetts, and concluded that they harmonized with its own decisions.

Counsel for executor repeats that this is directly in the teeth of the Estate of Tompkins, 132 Cal. 173, 64 Pac. 268, upon which he relies with confidence. What is the doctrine laid down in this case, which it is claimed disposes of the Wisconsin citation? That doctrine seems to be that where the donor has made an absolute gift, there is no method in which he can make that donation effective as an advancement short of a legally executed will disposing of his property. This doctrine is stated in Woerner, in these words: "The donor can so alter the character of a gift or conveyance as to enlarge the rights and privileges of the recipient, but not so as to restrict them. Hence a father has the undoubted right to change a debt owing to him into an advancement and an advancement into a gift, but not, without the donee's consent, an absolute gift into an advancement."

Also in Thornton, as follows: "A gift vests the absolute title to the property in the donee, free from any and all control over it by the donor. It differs from an advancement chiefly in the fact that it cannot be brought to reduce the portion of the parent's estate that the donee child receives when his parent has died intestate. To permit the donor to change an absolute gift to an advancement without the consent of the donee would materially reduce the value of his prospective interest in his parent's estate. All the cases, therefore, declare that a gift cannot be changed to an advancement without the consent of the donee."

This rule is expressed in 1 Am. & Eng. Ency. of Law, 780: "A donor may change an advancement to an absolute gift without the knowledge or consent of the donee. He cannot, however, reverse the process and deprive the donee of property already his, by changing a gift to an advancement."

It seems to be the law that the only way that a change can be made as against the donee is by his acknowledgment in writing; and there is no such acknowledgment here. The mere declaration in the will is not sufficient under the statute to change a gift into an advancement without the donee's consent; by mutual action an advancement may be changed into a gift, but an absolute gift may not be converted into an advancement without the consent of the donee or by the later

legally executed will which deducts the amount of the absolute gift from the share of the donee.

The sum of all this argument for the excluded heirs is, that what was given to them was an absolute "gift." Decedent testator parted irrevocably with those properties. Every one of these transactions imported an absolute gift, and it was not competent for the donor by any subsequent declaration to change its character. He parted with all power over the property once he made the gifts to his sons John and Adolph, and he could not thereafter restrict or qualify the nature of the act. The only way in which the charge could be made as to the donee is by the latter's acknowledgment in writing: Cal. Civ. Code, sec. 1397.

According to the dominant authorities this charge in writing must be contemporaneous; it may not be ex post facto; it cannot be effected by a recital in a will made several years subsequently; but this will does not charge these gifts as advancements; on the contrary, testator declares in the fourth clause that he makes no provision "in his will" for John and Adolph, because he had already "given" to them a large part of his estate. That was his ex parte and ex post facto declaration, in which there was no written consent of the donee, as by the statute required. When he made the gift it should appear that it was intended as an advancement, otherwise it is an absolute, irrevocable gift; and no subsequent statement, even in a will, can change the original character of a completed transaction. It is a question of intent to be determined by contemporaneous circumstances; always to be ascertained by what took place at the time, and, in the absence of evidence as to this, by the attendant circumstances: Reinochls' Estate, 212 Pa. St. 360, 61 Atl. 943.

In the Michigan case it would seem that the testator had retained the right of testamentary disposition over the property. It was a case of completed testacy, and therein differs from the case at bar: McClintock's Appeal, 58 Mich. 152, 24 N. W. 549. The other Michigan case, Power v. Power's Estate, 91 Mich. 587, 52 N. W. 60, seems to be strictly a case of contemporaneous charge. Neither of these cases would ap-

pear to be advantageous to the contention of counsel for executors.

These cases do not serve to support the proposition presented by counsel, in the estimation of this court, if they are read aright.

Counsel for executors advert to the effect of the judgment upon the demurrers in the matter of the partial distribution, and insists that that judgment imports total intestacy, and that, therefore, opponents here have no standing.

What was determined by the judgment upon the demurrers in the matter of the partial distribution? The reasoning of the court in coming to its conclusion cannot bind the parties, but the judgment as entered determines the character of the issues submitted and decided, and that judgment or order recites that the matter coming on regularly to be heard upon the demurrers filed by John and Adolph as heirs at law to the amended petition of Claus A. and Rudolph, praying for distribution to them, as trustees named in the will of Claus Spreckels, of certain properties described upon certain trusts and to be by them held to certain uses and purposes in said will set forth, "and it appearing to the court that Anna Christina Spreckels, widow, and named in said will and testament of said Claus Spreckels, deceased, died in the city and county of San Francisco on the 15th day of February, 1910, at the hour of 7 o'clock and ten minues, A. M. of said day, and the death of said Anna Christina Spreckels having been suggested to this court, and the court having the said matters under submission, and being fully advised in the premises, it is hereby ordered, adjudged and decreed that said demurrers be sustained and said amended petition of said Claus A. and Rudolph be refused and denied." This was dated February 18, 1910.

This is the judgment appealed from, the decision of the court, and whether erroneous or correct must stand or fall by its terms. In the course of the opinion this court said: "It appears to be admitted that the first trust purpose declared by the will, to provide an income for the wife is valid; but it is asserted that the second and third trust purposes are

void, because neither is authorized by the statute": 5 Cof. Prob. Dec. 320.

The argument then seemed to turn upon those two trust purposes.

The opinion alluded to said further: "It is admitted that the first trust, for the life of the widow, is valid, and does not exhaust the fee"; and then proceeded to discuss the unity and entirety of the disputed trusts, saying, among other things, that the only way in which the petitioners could come into possession of their parts would be through the transfer from the trustee to them upon the death of the widow of testator. The life trust was treated throughout as removed from the range of argument, and the court's mind appeared to have been occupied with the other paragraphs of the will: 5 Cof. Prob. Dec. 353.

By coincidence the announcement of the decision and the intelligence of the death of the widow were almost simultaneous, but the official and formal document was later in promulgation and minuted date and incorporated the fact, as above recited, of the death of the widow.

Thus the record stands, and, technically, the effect was to declare that the life estate had terminated and the petition of the trustees for partial distribution to them was denied as of that date.

It seemed to have been assumed all around upon the argument that the life estate to the widow was valid and the court accepted that assumption, and the trust as to the remainder of the corpus was assailed and held to be void. There was no contention in the argument upon the life trust. It was not put in issue in the pleadings, and hence cannot be considered as a factor in the solution of this problem. The question was as to the validity of the dispositions in trust dependent upon the death of the widow, and it was these dispositions that were specifically dealt with and held void. As in the New York case, Messman v. Egenberger, 46 App. Div. 46, 61 N. Y. Supp. 556, the testator undertook to create a trust.

The testator, however, had provided in his will, as Claus Spreckels did, that his wife during her lifetime should have the use and benefit of the income of his estate, and the

remainder was cast into this trust which the court held void as suspending the power of alienation for more than two lives in being, and as to property upon which the testator had abortively sought to make that trust operate he died intestate, and that property went the way of the law of intestate succession; and it was sought to apply the doctrine of advancement in that case, but the New York court held that the doctrine could not be applied because there was no total intestacy, that the life interest of the wife in the corpus of this fund was a material and substantial disposition by will and rescued the testamentary document from the allegation that it stood for a total intestacy.

That this construction may defeat the intention of the testator is the result of his endeavor to create an estate which was forbidden by the law, as declared for many decades by our courts, and, as was said in the New York case just cited, decided in 1899, it is the construction given to the statute by the courts in England, from which our statutes came, and we should not be justified at this date in changing what has become a rule of property.

It may be that, by the application of this rule, testator's intent may be frustrated in one case and in another accomplished, yet it must be applied by the court, even though it work both ways, according to circumstances.

We have had in the case at bar much highly technical discussion as to the meaning of the words and phrases, "decedent," "intestate," "an intestate," "the intestate," and whether or not the substitution of one term or phrase for another alters the substance, and counsel for executors argues that the change of the word "intestate" in the statute of 1850 to the word "decedent" in section 1397 of the Civil Code operates an enlargement of the meaning of the term to include testacy, and that, therefore, even if this court hold that this is a case of partial testacy, still it may be construed as within the law of advancement.

An examination of code history will show that our codifiers did not intentionally make any such distinction, and a comparison of code contexts will serve the same purpose. The codifiers seem to have had in mind the English rule which

made total intestacy a postulate for advancement: See Annotated Civil Code of California. In England, as is conceded, there must be a *total* intestacy to invoke the doctrine of advancement. It never has been held there that it applied in any other case. In running our code sections concerning the administration of intestate estates we find these terms, "intestate" and "decedent," used indifferently. Compare, for example, the subdivisions of section 1365 as to the order of persons entitled to administer, and it will be seen that in that statute the word "decedent" is used as the equivalent of a person dying intestate. This is the way in which the New York court undertook to interpret the expression by going to the provisions of the statute governing the granting of letters of administration: Thompson v. Carmichael, 3 Sand. Ch. (N. Y.) 120.

The word "decedent" as used in the Code of Civil Procedure, relating to the granting of letters of administration, should be construed in its usual and ordinary sense, which, as defined by Webster, means a deceased person—that is, one dead; departed from this life. Hence one, though civilly dead, by reason of imprisonment for life, is not a decedent, within the meaning of the statute: Zeph's Estate, 50 Hun, 523, 3 N. Y. Supp. 460. The word "decedent" means either a testator or a person dying intestate: Bouvier's Law Dictionary.

The word "intestate" signifies a person who died without leaving a valid will, and hence the validity of the will is a test as to intestacy: Cameron's Estate, 47 App. Div. 120, 62 N. Y. Supp. 187, 188.

The word "intestate," in its legal and popular sense, means a person who dies without making a will. Such is its meaning in 1 Revised Statutes, page 754, providing that the sum of advancements made to the child of an intestate shall be deducted from his share of the estate, unless the advancements exceed such share, in which case the child shall inherit nothing: Messmann v. Egenberger, 61 N. Y. Supp. 556, 46 App. Div. 46; Thompson v. Carmichael, 3 Sand. Ch. (N. Y.) 120, 129; Kent v. Hopkins, 86 Hun, 611, 33 N. Y. Supp. 767, 768. Within the meaning of this law and rule, a man who dies

leaving a will is not an intestate, although by his will he bequeaths only his personal estate, leaving his real estate undisposed of: Thompson v. Carmichael, 3 Sand. Ch. (N. Y.) 120, 127, 129. Or one who dies devising all of his real estate, or a case of partial intestacy: Kent v. Hopkins, 86 Hun, 611, 33 N. Y. Supp. 767, 768.

It is not necessary to engage further in a consideration of the disputations as to the meaning of these terms. The foregoing remarks and citations are sufficient to justify the conclusion that the code of California cannot be construed to conform to the contention of the counsel for executors. This counsel has argued with characteristic force and ingenuity that our statute applies to partial as well as total intestacy, and he treats that proposition as established, saying with vigor that in California, for the first time in the history of legislation, the law of advancements is made definitely applicable beyond the slightest doubt or question to cases of both total and partial intestacy and to both real and personal property; and his argument is grounded upon this verbal distinction between terms which Mr. Charles O'Conor in the Carmichael case considered ingenious but unreal, and the court in that case seemed to adopt that counselor's view, as may be seen in the citations already made herein.

I have read the arguments and opinion in that case with care, and, so far as the counsel are concerned, it is not too much to say that in the matter at bar the propositions have been presented with at least equal learning and ability in advocacy.

An intent to alter the pre-existing law is not to be inferred from a mere change of phraseology in a revision of prior statutes, and there is no reason to conclude that our codifiers had any such purpose in mind, and as we have seen in the article relating to granting letters of administration, the word "decedent" was used as synonymous with "intestate."

To interpret this statute otherwise would be to make a constructive intestacy where there was no actual one. This would savor of judicial legislation. The safe course, as pointed out in the Carmichael case, is to follow the plain terms of the

statute and not to attempt innovation, and on the statute itself a total intestacy appears to be contemplaed.

But the counsel for executors in the case at bar says that we have here a new proposition; the first case under our modern legislation. The question has never before arisen, and it is one of original impression, and the general principles of equity and justice should guide the court, for the case presented is without precedent in the books. The counsel declares with great energy that it is now the law, in view of our statute, that if a testator expresses the wish in his will that what he has given some of his children shall stand as their share in his estate, that the provision will be enforced, even if the gifts were not technically "advancements," and even though the testator makes no devise or bequest to any person directly; and counsel insists that in such case the general principles of jurisprudence, of justice and of equity shall be the guiding star that will move the conscience of the court to adopt an enlightened rule, a just and a fair rule—one that is consistent with the entire situation thus presented.

The court is admonished that it is commanded to see to it that the testator's wishes shall prevail, as far as possible, and that this is the cardinal rule in all cases, including those where it is obvious that the will cannot have effect to the full extent, for it is the spirit of all of this legislation that equality shall be effected among children. This is the very spirit of the law of advancements. The court is to seek and to work out of the statute—out of this "transcript of the human affections"—equality as decreed in the statute of distributions through this new law enacted by our legislature.

To this earnest and eloquent plea the response may be made, in the language of the same counsel, that however absurd and without justification the statute law may be, it is so written, and it may be added, that the court is not at liberty to change it by construction. Although, as counsel says, many expressions of judges and text-writers, though confessedly not involving cases of this identical character, tend in the direction of his view, yet they are mere suggestions of sympathy rather than statements of law.

"Many comments are made in text-books and decisions as to the injustice of the rule restricting the statute to cases of total intestacy; but, nevertheless, the law is so written down and embodied in many of the states of the Union through express legislation that advancements are confined to cases of intestate estates."

Counsel thinks, however, that this law is not embodied in the legislation of California, and that there has as yet arisen no case that presents for direct adjudication under a statute worded as is ours, in the light of the past and the present, the precise question here involved. This case is unique of its kind and will be a leading case on this point, and the court is asked to hew out a path in what may be called a pioneer trail.

The difficulty with this argument is that it asks the court to blaze a trail and to hew out a path where this is already a well-defined road which the court must pursue. It is not permitted this tribunal to originate ideas as to what is absolute equity and abstract justice. We have a supreme court that insists that its subordinates follow the law as it is set down in the statutes; and in this case we seem to be controlled by a statute which requires the manifestation of an advancement by a contemporaneous writing and a total intestacy.

From these premises the conclusion must be that the estate should be equally divided among the heirs at law.

Decree accordingly.

As to Statement in Will as evidence of advancement, see note in Ann. Cas. 1915A, 930. As to when interest is chargeable on advancements, on distribution of intestate estate, see note in Ann. Cas. 1912A, 955.

ESTATE OF EDWARD BARRETT, DECEASED.

[No. 21,229; October, 1899.]

Administration—Whether Relatives Entitled to.—The relatives of a decedent are entitled to administer only when they are entitled to succeed to the personal estate or some part thereof.

Administrator—Right to Nominate.—In the case of a surviving husband or wife the right to nominate an administrator under section 1365 of the Code of Civil Procedure is absolute, while in the case of other persons contemplated by section 1379 the right is at most a mere power to address a recommendation to the discretion of the court.

Administrator—Relation Toward Heirs and Estate.—An administrator sustains to the estate, the heirs and other persons interested the relation of trustee. He takes neither an estate, title nor interest in the lands of the intestate, but a mere naked power to sell for specific purposes.

Administrator—Death of Nominor.—If the daughter of a deceased person gives a third person authority to apply for letters of administration in her behalf, the power so granted ceases and determines at her death.

Descent—Vesting of Estate in Heir.—Immediately upon the death of an ancestor his estate, both real and personal, vests at once by the single operation of law in the heir.

Descent—Law Purely Statutory.—The descent of estates of deceased persons is purely a matter of statutory regulations.

Descent—Husband as Heir of Wife.—If a widower dies intestate leaving collateral relations and one child, a daughter, and she, before the estate is administered, dies intestate without issue, leaving neither father, mother, brother nor sister, the estate vests in her surviving husband as her heir under subdivision 5 of section 1386 of the Civil Code.

Administration — Husband as Relative of Wife.—A husband is of "kin" to his wife and her "relative," so as to be entitled to administer on her estate under section 1365 of the Code of Civil Procedure.

Administration of Wife's Estate by Husband.—If a widower dies intestate leaving collateral relatives and one child, a daughter, and she, before the estate is administered, dies intestate, without issue, her surviving husband is entitled to administer her estate as against the collateral relatives of her father.

Administration Follows Property.—The right to administer follows the property.

Administration — Statutory Kinship.— The law of administration contemplates a legal or statutory kinship as well as a kinship by blood.

Administrator—Competency Determined of What Time.—It is the status of the petitioner at the time of the grant of administration that determines his competency.

The Public Administrator must Always Give Way to the relatives who are entitled to succession, provided they are qualified to assume the functions of administration.

Application for letters of administration.

Charles A. Lee, Lee & Coghlan, for John Duffy, surviving husband of daughter of decedent.

A. Ruef, for Public Administrator Drinkhouse.

Hugo D. Newhouse, James P. Sweeney, for others.

COFFEY, J. The facts before the court are few and uncontroverted. Edward Barrett, father-in-law of John Duffy, petitioner herein, died, a widower and intestate, on the second day of February, 1899. He left surviving him as his sole heir at law a daughter, Margaret Louisa Duffy, otherwise known as Louisa Duffy, wife of the petitioner John Duffy.

Thereafter, to wit, on the 30th day of March, 1899, the said Margaret Louisa Duffy departed this life intestate and without issue. Margaret Louisa Duffy, at her decease, had living neither father, nor mother, nor brothers, nor sisters. But she left a surviving husband, John Duffy, the petitioner herein.

Margaret Louisa Duffy died before any administration had been had upon the estate of her dead father, Edward Barrett.

Theresa Hartnett, who also petitions the court to be granted letters of administration, is a niece of the late Edward Barrett. She alleges that the heirs at law of the said Edward Barrett are the said Theresa Hartnett, Lizzie Hartnett, also a niece of the said Edward Barrett, deceased, and a sister of the said Edward Barrett, whose residence is in Ireland, and certain cousins and collateral relatives of the said Edward Barrett, deceased.

John Daly, also a petitioner herein, stands upon an alleged authority, alleged to have been given him by Margaret Louisa Duffy, deceased, in her lifetime. Under this pretended authority no legal steps were taken by Daly beyond the mere

filing of a petition. No hearing of the petition was ever had and no letters of administration were ever granted.

The public administrator also applied for letters.

The statutory rules of descent in California provide and establish how the title to estates shall pass by descent as well as by devise and deed. The statute assumes to furnish and does furnish in every possible case in precise terms the rule by which alone title to the estate of a deceased intestate can be acquired in this state. In the determination of such questions the court will look alone to the statutes of distribution and must exclude any and all persons not within its provisions.

The petitioner, Theresa Hartnett, niece of Edward Barrett, deceased, does not, upon the statement of facts, come within any provision of the statute, and her claims either to any share in the property or to the right of administration are effectually disposed of by the terms of the statute: Civil Code, sec. 1386, subds. 1, 5; Code Civ. Proc., sec. 1365.

The sections cited also exclude from participation in the estate all the persons mentioned in the petition of Theresa Hartnett.

The Civil Code, under the title "Succession," provides in section 1386 as follows: "When any person having title to any estate not otherwise limited by marriage contract dies without disposing of the estate by will, it is succeeded to and must be distributed, unless otherwise expressly provided for for in this Code and the Code of Civil Procedure, subject to the payment of his debts in the following manner: . . . If the decedent leave no surviving husband or wife, but leave issue, the whole estate goes to such issue."

Edward Barrett was a widower. He left as his sole issue, one daughter, Margaret Louisa Duffy, the lawful wife of the petitioner, John Duffy.

It follows that immediately upon the death of Edward Barrett his entire estate both real and personal vested at once in his sole heir at law Margaret Louisa Duffy.

It can make no sort of difference that the estate had not been administered at the time of the decease of Mrs. Duffy.

Administration is but the machinery of the law for transferring the possession of estates after all the debts of the intestate have been paid.

Mrs. Duffy, therefore, died seised in contemplation of law of an estate of inheritance. She could, in her lifetime, have made valid testamentary disposition of the estate, and having neglected to do so, the statute takes hold of the estate and by its own force passes all of her interests in it to her heir at law.

Theresa Hartnett never was and is not now an heir at law or any heir to any part of the estate of Edward Barrett, deceased.

Neither is she entitled to administer. The right to administer upon the estate of a deceased person arises alone from the statute.

Section 1365 of the Code of Civil Procedure prescribes the order in which administration upon the estate of deceased persons must be granted. The relatives of the deceased are entitled to administer only when they are entitled to succeed to the personal estate or some part thereof. That is the statutory and the only test, and, applying this test to the case of Theresa Hartnett, it is obvious that she is excluded. If it be claimed that not being an heir she is nevertheless entitled to administer as "next of kin," the answer in the negative is found in subdivision 7 of the section, which employs the following language: "The next of kin entitled to share in the distribution."

By no possible theory can Theresa Hartnett share in the distribution of the estate. She was not an heir to Mrs. Margaret Louisa Duffy. Though related by blood to Edward Barrett she must be viewed, in the light of the statute of distribution, in the position of a stranger. She has no other standing: Estate of Ingram, 78 Cal. 586, 12 Am. St. Rep. 80, 21 Pac. 435; Estate of Carmody, 88 Cal. 616, 26 Pac. 373.

The reasoning by which Theresa Hartnett is excluded alike from the succession and the administration applies with equal exclusionary force to the sister of Barrett residing in Ireland and to all the collateral relatives named in the Hartnett petition.

The petitioner, John Daly, under the pretended authority given by the late Mrs. Duffy, has no standing in court.

The right of Mrs. Duffy, in her lifetime, to nominate a person to act as administrator upon the estate of her deceased father, if it existed at all, must have proceeded from the statute; the right could not have been derived from section 1365 of the Code of Civil Procedure, for that section restricts the right of nomination to the surviving husband or wife. And Mrs. Duffy being a daughter was obviously not authorized to nominate.

The authority for a valid nomination by Mrs. Duffy must therefore be found, if at all, in section 1379 of the Code of Civil Procedure, which is as follows:

"Administration may be granted to one or more competent persons, although not otherwise entitled to the same, at the written request of the person entitled filed in court.

It will be observed that the language "administration may be granted" is permissive and reposes a discretion in the court.

In Re Carr's Estate, 25 Cal. 585, section 66 of the Practice Act, which has been re-enacted into section 1379 of the code, was held to apply only to cases where a vacancy exists in the administration.

In Re Healy's Estate, 122 Cal. 162, 54 Pac. 736, it is held that the section reposes a discretion in the court and that the court may appoint in the exercise of its discretion the person next entitled. But the right of nomination is one that may be withdrawn by the nominor.

In Re Shiel's Estate, 120 Cal. 347, 52 Pac. 808. In that case the court said: "The right to have letters issued to the nominee was the right of the widow and not the right of the nominee."

Bearing in mind the distinction, that in the case of a surviving husband or wife the right to nominate under section 1365 is absolute, while in the case of those persons contemplated by section 1379, the right is at most a mere power to address a recommendation to the discretion of the court, can it be said that the nomination of Mrs. Duffy addressed to the mere discretion of the court, conferred an indefeasible right upon the nominee? If it was in the discretion of the court

to reject her nomination upon the hearing, can it be said that now, no hearing having been had, any absolute right has passed to Daly, the nominee?

Again, if the absolute right of a surviving husband or wife confers no privilege which may not at the wish of the nominor be withdrawn at any time before the issuance of letter of administration, can it be said in reason that a mere right such as Mrs. Duffy had under section 1379, to address a recommendation to the discretion of the court, clothed the nominee with a right that cannot be disturbed?

It should be borne in mind that Daly, if he was authorized to do anything, was empowered to apply for letters of administration in the place of Mrs. Duffy to perform an act for her—and that, before any hearing of the application, Mrs. Duffy died and her estate became vested in her surviving husband.

An administrator sustains to the estate, the heirs and other persons interested, the relation of trustee. He takes neither an estate, title nor interest in the lands of his intestate, but a mere naked power to sell for specific purposes: Warvelle on Vendors, 88; Ryan v. Duncan, 88 Ill. 144.

In Bergin v. Haight, 99 Cal. 52, 33 Pac. 760, it is said: "An administrator acts as trustee and agent for the owners of the property, whether heirs or assignees."

A right to apply for letters of administration cannot be of greater dignity than a right to administer after letters granted. Daly received from Mrs. Duffy a mere power to apply for letters of administration in her behalf and the power, like other powers not coupled with an interest in the thing granted, ceased and determined with the life of the grantor.

Daly seeks to act for a person not in being, and in the nature of things, the right of the nominor having ceased he has no standing to sustain his application. The power granted by Mrs. Duffy died with her.

The petitioner, John Duffy, is vested by operation of law with the legal title to all the property, both real and personal, now in controversy in this proceeding. It is the rule in this state that immediately upon the death of an ancestor his

estate, both real and personal, vests at once by the single operation of law in the heir: Civ. Code, sec. 1384.

In the case of Beckett v. Sclover, 7 Cal. 215, 68 Am. Dec. 237, the court said: "The true theory is that both the real and personal property of the intestate vest in the heir, subject to the lien of the administrator for the payment of the debts and the expenses of administration, and the right of the administrator to present possession."

The property of the intestate vests at once in the heir in being: Drake v. Rogers, 13 Ohio St. 21.

This proposition is sustained in the case of Brenham v. Story, 39 Cal. 179. The doctrine of this case is thus stated in the syllabus: "Upon the death of the ancestor the heir becomes vested at once with the full property and his estate is indefeasible": See, also, Haynes v. Meeks, 10 Cal. 110–120, 70 Am. Dec. 703.

In the case of Updegraff v. Trask, 18 Cal. 459, the court went so far as to hold that the heir, before administration, might maintain ejectment: Bufford v. Holliman, 10 Tex. 560, 60 Am. Dec. 223.

In Bates v. Howard, 105 Cal. 173, 38 Pac. 715, the supreme court said: "The title of the heir of a deceased person to real estate owned by him does not originate in the decree of distribution, but comes to them directly from their ancestor, subject only to the control of the probate court and to the possession of an administrator appointed by the court for that purpose."

Edward Barrett died a widower and intestate. He left one child, Mrs. Margaret Louisa Duffy. All his estate vested immediately in Mrs. Duffy. The law casts the estate upon her and without any volition on her part: Civ. Code, sec. 1386, subd. 1.

The estate vested by the single operation of law in Margaret Louisa Duffy was an estate in fee simple or an absolute fee: Civ. Code, sec. 762.

The estate so vested in Margaret Louisa Duffy, by the single operation of law, could be divested only in one of three ways:

First. In satisfaction of the debts of the ancestor and the necessary expeness of administration.

Second. By the voluntary act of Mrs. Duffy—by deed or will.

Third. By operation of law.

But Mrs. Duffy died intestate and without issue. She was at the moment of her death the legal owner of the estate which passed to her—was cast upon her in the phrase of the books—immediately upon the decease of her ancestor, Edward Barrett.

She had neither father, mother, brother nor sister, and consequently upon her death the estate descended according to the rule prescribed in section 1386, subdivision 5, of the Civil Code.

"If the decedent leave a surviving husband or wife, and neither issue, father, mother, brother, nor sister, the whole estate goes to the surviving husband or wife."

This section of the code makes the surviving husband, in the circumstances of relationship, here presented, the heir of his wife.

The descent of estates of deceased persons is purely a matter of statutory regulation. It has been well said—and this is too elementary to require the support of the authority of decided cases—that: "The right of property extends naturally no further than the life of the present possessor; after which it would by the law of nature again become common and liable to be seized by the next occupant; but society, to prevent the mischiefs that might ensue from a doctrine so productive of contentions, has established conveyances, wills and successions, whereby the property originally gained by possession is continued and transmitted from one man to another, according to the rules which each state has respectively thought proper to prescribe": 2 Bl. Com., c. 14, p. 211.

This is the principle upon which each statute of succession is founded. It is the principle which treads section 1386 of the Civil Code. John Duffy is therefore sole heir at law to his deceased wife, and the absolute legal owner of all the estate which she received as the sole heir of her deceased father.

"Section 1386 of the Civil Code," remarked the supreme court in the Estate of Pearsons, 110 Cal. 524, 42 Pac. 960, "has no allusion to the blood of the first purchaser and makes

no attempt at any distinction founded upon the sources from which the estate of the decedent may have been derived."

An heir is made such by the force of the statute. In the section of the code here considered the legislature has modified and changed the rule of the common law. It has made the surviving husband and heir—here the sole, the absolute heir.

John Duffy is, therefore, a relative of his deceased wife within a meaning of section 1365 of the Code of Civil Procedure, and being entitled to take the whole estate, both real and personal, and the whole estate having been vested in him by operation of law, is entitled to letters of administration.

In the Estate of Davis, 106 Cal. 453, 39 Pac. 756, Mr. Justice Van Fleet said: "It is to be observed that the statute makes the right of the relatives to administer to depend upon the question of their right to succeed to the personal estate or some portion thereof. And it is further to be noted that the term relatives is used in the statute in the generic sense, and so as to expressly include the husband and wife in the same category with the other relatives therein enumerated."

Williams on Executors and Administrators, volume 1, page 512, lays down what is conceived to be the true doctrine in regard to administration of the estates of deceased persons.

"The object of the statutes of administration is to give the management of the property remaining unadministered to the person who has the beneficial interest in it."

In other words, the rule to be derived from the settled policy of the law, the language of the statutes in this state and what may be fairly said to be the uniform current of judicial decision, is that administration follows the property.

If Duffy is heir to his deceased wife, by force of the statute, so by force of the same statute she is his ancestor.

If Margaret Louisa Duffy, the ancestor, was in her lifetime clothed by the law with the legal title to an estate of inheritance, upon her death it was cast upon her surviving husband and he is within the letter and the spirit of the statute—as the law-created heir and the only heir—the one person entitled to administer upon the estate.

But from another point of view the petitioner, John Duffy, is entitled to letters of administration.

Section 1365, Code of Civil Procedure, prescribes the order in which administration of the estates of deceased persons must be granted.

We have already seen that the surviving husband is by the law of this state made the heir to his wife, and that within the meaning of the statute he is her "relative" and the word "relative" is there used in the generic sense, so as to expressly include the husband and the wife in the same category with the other relatives therein enumerated.

The husband is so included in the expression "relatives" in the light of the principle that the right to administer follows the property—a principle which is of universal application in the construction of statutes of administration.

This proposition leads to a consideration of the rights of the surviving husband or wife as "next of kin."

The seventh subdivision of the section enumerates as among the relatives entitled to administer "the next of kin entitled to share in the distribution of the estate." It is obvious from the considerations heretofore presented, and, unless the petitioner, John Duffy, comes within the meaning of the term "next of kin," as used in the statute, there are no persons now in being to whom the term can, in this proceeding, be applied.

The "next of kin," within the meaning of the section, must be the "next of kin entitled to share in the distribution."

The statute of succession having, as we have seen, no relation to the blood of the first purchaser, and the right of administration being limited to those who are entitled to succession, it is obvious that, in determining who those persons are, we must resort to the statute itself, irrespective of any considerations of mere blood relationship.

Our statute has placed the husband in the position of heir to his wife, and, in this case has made him heir to property derived from her ancestor. He is therefore, for the purposes of succession and distribution, of "kin" to her; he is her "relative." This is true notwithstanding he is a stranger to her blood. The statute has for every beneficial purpose invested him with a legal status—the status of heir.

In Schuyler v. Hoyle, 5 Johns. Ch. (N. Y.) 206, Chancellor Kent held that the wife's choses in action vest in the husband by the statute of distribution as her "next of kin."

Indeed, it may be affirmed that while the word "kin" in a strict sense has been limited to relationship by blood, the word in the broad sense of our statute, must include both relations by blood and marriage. It is a familiar rule that, in the construction of statutes and other written instruments, the intention is the determining consideration, and when as in the statute under discussion, the technical words "next of kin" are qualified by the words "entitled to share in the distribution," it would seem that the plain intent of the legislature was to include within the meaning of the phrase the parties upon whom in case of intestacy, the law casts the estate—those persons entitled by operation of law to share in the distribution, whether their relationship be by blood or marriage.

The argument finds its support in the reason of the law, but the authority of decided cases is not wanting to sustain the proposition that the modern statutes contemplate a legal—a statutory kinship as well as a kinship by blood: Hibbard v. Odell, 16 Wis. 633; Betsinger v. Chapman, 88 N. Y. 487; French v. Freneh, 84 Iowa, 655, 15 L. R. A. 300, 51 N. W. 145, where the leading cases are reviewed and the doctrine broadly affirmed; Campbell Banking Co. v. Cole, 89 Iowa, 211, 56 N. W. 441; Steele's Adm. v. Kurtz, 28 Ohio St. 191; Ferguson v. Stuart's Exrs., 14 Ohio 140; O'Donnell v. Slack, 123 Cal. 285, 43 L. R. A. 388, 55 Pac. 906.

From the earliest times the test by which legal kinship was determined seems to have been the statute of distribution. Our statute makes a capacity to share in the distribution a necessary qualification.

Redfield in his work on Wills, volume 2, page 72, thus discusses the question: "As to who are the next of kin, and as such entitled to administer, it seems to have been held by the ecclesiastical courts that it was to be the same persons entitled to the goods under the statute of distributions. . . . There is no certain rule by which to guide the discretion of the probate court in selecting among those of equal degrees of affinity as no two cases will ever be precisely alike in all their circum-

stances. But it is said they should and naturally will prefer that person in whom the greatest number and weight of interests concur."

John Duffy takes the estate of Edward Barrett as heir at law. There are but two methods known to the law by which a person may acquire real property—one by descent and the other by purchase. It is obvious that Duffy is not a purchaser and that he takes by descent.

The word "heir" is not limited in its meaning to one to whom an estate of inheritance has descended from his immediate ancestor, but a person is the heir of one from whom he has inherited by several successive descents: Castro v. Tennent, 44 Cal. 253.

Had Mrs. Duffy died a widow and intestate, leaving as her sole heir a son, it cannot be seriously questioned that the court would have unhesitatingly bestowed the administration upon that son. Such son would have been the next of kin "entitled to share in the distribution," not alone to his deceased mother but to his deceased grandfather.

The son would have been entitled because found in the line of succession established by the statute, and for no other reason. John Duffy as the law-made heir, stands in precisely the same position. The circumstance that he was not entitled to administer at the death of Edward Barrett is entirely immaterial.

It is the status of the petitioner at the time of the grant of administration that determines his competency: Estate of Pingree, 100 Cal. 78, 34 Pac. 521; Estate of McLaughlin, 103 Cal. 429, 37 Pac. 410.

The legislature has placed the surviving husband within the preferred class of statutory heirs. As such statutory heir, he is in possession of every right conferred by the statutes of succession and distribution. It cannot be said that the statute has admitted him to the class for the purpose of inheritance—in this case for the purpose of the sole inheritance—and excluded him from the right of administration, which we have seen is within the reason and the spirit of the law, inseparable from the right of property.

It cannot be seriously urged that John Duffy has not succeeded by operation of law to every right in and to the estate of Edward Barrett, held in her lifetime by his deceased wife. Mrs. Duffy was clothed by the law with the absolute right to the estate, which carried with it the right of administration. By what theory is John Duffy, her successor in interest and heir at law, to be stripped of any of the rights thus created and conferred by the law?

The true legislative intent is thus interpreted by the supreme court in the Estate of Davis, 106 Cal. 455, 39 Pac. 756.

"The principle involved in the provision of the statute restricting the right of administration to those relatives entitled to take the personal estate is not new. It is but the expression of a policy which will be found to control the statutes of many, if not most, of the states upon the subject and it is well recognized in England. It has its foundation in the consideration that administration should be committed to those who are the ultimate residuary beneficiaries of the estate—those to whom the property will go after administration."

When the office of public administrator was created there was no intent in the legislative mind to modify, restrict or alter the great rule that the administration follows the property. The creation of the office of public administrator has, so far as the relatives entitled to succession are concerned, changed no rule of law, modified no policy, abrogated no rights. The legislature has seen fit merely to create an office intermediate in its position between the relatives entitled to administer on the one hand, and the creditors of the deceased on the other. The legislature has postponed the rights of creditors in favor of the office thus called into being. Superior to the creditors because so declared by the statute, the public administrator must always give way to the relatives who are entitled to succession, provided always they are otherwise qualified by residence and capacity to assume the functions of administration.

It follows as a proposition of law, upon reason and upon authority that the petitioner, John Duffy, as the person to whom all the property left by the late John Barrett must go

at the close of the administration, is entitled to letters of administration and that his petition should be granted.

The Principle involved in this case is considered in Estate of Lakemeyer, 6 Cal. Unrep. 695, 65 Pac. 475.

See, also, 5 Cof. Prob. Dec., 376.

ESTATE OF SIMON STRAUSS.

[No. 15,785.]

Executors—Accounts.—By Accepting the Office of Executor a person is presumed to consent that all his acts in that capacity shall be subject to judicial review, and to understand that the court of probate has the power, on the settlement of his account, to determine the extent of his liability to the estate.

An Executor is Accountable for All the Assets that come into his possession, excepting where loss may have been suffered without his fault.

Settlement of account of executor, George B. Mowry, contest and exceptions.

Frohman & Jacobs and Isaac Frohman, for contestants.

R. P. Wright, for executor.

COFFEY, J. This is a proceeding for the settlement of an executor's account and it is competent for the court sitting in probate, to determine all issues necessarily incident thereto. It is not an action to recover possession of property or for the determination of a right of possession, but a purely probate proceeding inquisitorial in its nature, under the statute, on the one hand to establish and substantiate an account of an executor, and on the other hand to surcharge and falsify that account by showing that the executor is chargeable with the value of certain assets which, if they no longer belong to the estate, have been lost through his culpable negligence.

It is apparent that decedent had an interest in the mining property at the time of his death, and, therefore, the question presented here for determination is simply whether or not the

executor is now chargeable upon the settlement of his account with the value of that interest. Under the statute the executor is accountable for all the assets which come into his possession excepting where loss may have been suffered without his fault: Code Civ. Proc., secs. 1613, 1614.

The executor, upon rendering his account, is amenable to examination touching any property and effects of the decedent and the disposition thereof, and all matters may be contested for cause shown: Code Civ. Proc., secs. 1631, 1636.

It is elementary that when a person accepts the office of executor, he must be presumed to consent that all his acts in that capacity shall be subject to judicial review, and that the court of probate possesses the power, upon the settlement of his account, of determining the extent of his liability to the estate. By the very act of filing his account and asking for its allowance by the court, he submits himself to the jurisdiction he has thereby invoked as to all matters necessary to be determined thereabout. To be efficient this jurisdiction should be exclusive; otherwise, where an executor is proved delinquent, the probate form would be practically impotent.

The court having come to the conclusion above announced, that it has power, sitting in probate, to deal with the transactions involved in this controversy, finds that the executor should be charged in his account with the value of the interest of the estate in the Bader gold mine, and it is proper in this case to consider cost as evidence of value. Interest should be added to the value at the statutory rate, with annual rests, beginning at a point say twelve months from the death of the decedent. He should be charged, also, with the amount of net profits realized by him in carrying on the business of decedent, as ascertained upon the hearing; also with legal interest, compounded annually from May 18, 1896, on the balance shown by his exhibit to have been in his hands on that date, because of the delay in settling the estate, and also because he has been using the money in his private business. He should be charged with the amount of gold extracted from the mine received by him at about the time of the death of the decedent, with legal interest as before calculated. He failed to account for this to the estate, but used it in working

the mine. He should be charged, also, with the value of the wearing apparel left by the decedent; and also with sums received from Sawyer Tanning Company and S. McBowen & Son. There should be struck from his account the payments to Lueders and Runge & Elliott, expert accountants and typewriters, as illegal charges. The executor's claim for services as superintendent of the mine is disallowed. He should furnish a bond. Let findings be drawn formally and presented to the court.

This Case was Before the supreme court in 144 Cal. 553.

IN THE MATTER OF THE ESTATE OF MARGARET M. ELLIS.

[February 23, 1912.]

Executors and Their Attorneys—Application for Compensation.—Section 1616 of the Code of Civil Procedure, as amended in 1911, referring to applications by executors and administrators, and the attorneys of either, to be compensated for services, is a remedial statute and to be liberally construed.

Statutes—Retrospective Operation.—A Remedial Statute, unless it provides to the contrary, is to be given a retrospective effect, if to do so does not violate some vested right or constitutional guaranty.

Applications of administrator and attorney under section 1616, Code of Civil Procedure, as amended in 1911.

Joseph Leggett, for applicants.

COFFEY, J. The provisions of section 1616, Code of Civil Procedure, relating to applications of this kind are remedial. In Black on Interpretation of Statutes, page 489, the author says: "A law is equally entitled to be considered a remedial statute whether it remedies a defect of the common law or of the pre-existing body of statute law." And on the same page he says: "Any statute which gives a remedy or means of redress where none existed before, or which creates a right of action in an individual, or a particular class of individuals, is remedial, within the meaning of this rule."

These provisions being remedial, they should be liberally construed so as to effect the purpose for which they were enacted. In Cullerton v. Mead, 22 Cal. 95, 98, Mr. Justice Crocker, delivering the opinion of the court, said: "This is a remedial statute, and it must, therefore, be construed liberally, and when the meaning is doubtful, it must be so construed as to extend the remedy."

In Toomy v. Dunphy, 86 Cal. 639, 642, 25 Pac. 130, Gibson, C., said: "Thus we perceive that the clause is remedial in its object, and if its meaning is doubtful, as suggested by this controversy, its words will have to be construed so as to suppress the mischief adverted to, and advance the remedy."

In Buck v. City of Eureka, 97 Cal. 135, 137, 31 Pac. 845, Chief Justice Beatty, delivering the opinion of the court, said: "The rule, on the contrary, is, that remedial statutes should be liberally construed in favor of the remedy, and rules of procedure are remedial in their nature."

And in Brackett v. Banegas, 99 Cal. 623, 34 Pac. 344, it was held that a statute intended to be remedial should receive a liberal interpretation.

These provisions relate to procedure, and therefore apply to pending as well as future proceedings.

In Sutherland on Statutory Construction, volume 2, section 482 (2d ed. by Lewis, sec. 674), it is said: "Where a new statute deals with procedure only, prima facie it applies to all actions—those which have accrued or are pending, and future actions."

In Judkins v. Taffe, 21 Or. 89, 92, 27 Pac. 221, Bean, J., delivering the opinion of the court, said: "And such remedial statutes take up proceedings in pending causes where they find them, and when the statute under which such proceedings were commenced is amended the subsequent proceedings must be regulated by the amendatory act."

In Lazarus v. Metropolitan E. Ry. Co., 145 N. Y. 581, 40 N. E. 240, it was decided that a law changing procedure applies as well to actions pending when the statute was passed as to those subsequently commenced, unless the former are specially excepted. In delivering the opinion of the court in that case, at page 585, Chief Justice Andrews said: "But

it would be a very inconvenient rule, tending to great confusion, if a rule of practice existing when an action is commenced attaches itself to the substance of the right in litigation so that it could not be changed, or that a law changing procedure should be held inapplicable to subsequent proceedings in pending actions unless in terms made applicable thereto."

In Fish v. Chicago etc. Ry. Co., 82 Minn. 9, 83 Am. St. Rep. 398, 84 N. W. 458, Chief Justice Start, delivering the opinion of the court, said: "In the absence of any proviso to the statute indicating an intention to exclude pending actions, it is clear that the only permissible construction of it is, that it is, and was intended to be, retrospective in its operation, and that it applies to pending actions as well as to future ones."

The provisions under consideration are prospective in their operation.

In Larkin v. Saffarans, 15 Fed. 147, it was decided that statutes which are remedial will be given a retrospective effect unless they direct to the contrary.

Chief Justice Mitchell, in delivering the opinion of the court, in Connecticut Mutual Life Ins. Co. v. Talbot, 113 Ind. 373, 378, 3 Am. St. Rep. 655, 14 N. E. 586, said: "The rule peculiarly applicable to remedial statutes, however, is, that a statute must be so construed as to make it effect the evident purpose for which it was enacted, and if the reason of the statute extends to past transactions, as well as to those in the future, then it will be so applied, although the statute does not in terms so direct, unless to do so would impair some vested right or violate some constitutional guaranty."

Application granted.

IN THE MATTER OF THE ESTATE OF ADOLPH SUTRO, DECEASED.

[No. 51 (N. S.); February, 1912.]

Executors—Application for Allowance and Commissions.—Section 1616 of the Code of Civil Procedure, as amended in 1911, referring to applications by executors and administrators to the court for allowances to them on their commissions, is remedial in nature, and therefore, by being applied to present proceeding, not given a retroactive effect.

Application of Georgiana A. Adamson for partial allowance of compensation of W. H. R. Adamson, deceased, executor.

Joseph C. Campbell, for applicant.

The question before the court is, whether the recent amendment of section 1616, Code of Civil Procedure, is operative upon estates which were pending, at the time of the enactment of the amendment. The new paragraph of the section reads:

"At any time after one year from the admission of the will to probate, or the granting of letters of administration, any executor or administrator may, upon such notice to the other parties interested in the estate as the court shall by order require, apply to the court for an allowance to himself upon his commissions, and the court shall, on the hearing of such application, make an order allowing such executor or administrator such portion of his commissions as to the court shall seem proper, and the portion so allowed may thereupon be charged against the estate."

The sole objection urged to the application of this amendment is, that it would be giving it a retroactive operation.

It is in order, then, to first ascertain what the supreme court has said concerning the meaning of "retroactive legislation."

In Higgins v. Bear River Mining Co., 27 Cal. 153: "A statute which takes away or impairs any vested right acquired under existing laws, or creates a new obligation, or imposes a new duty, or attaches a new disability in respect to any

transactions or considerations already past, is to be deemed retrospective."

It was held in Litson v. Smith, 68 Mo. App. 397, that a statute is not retrospective in the constitutional sense because a part of the requisites for its action is drawn from a time antecedent to its passage: Citing Endlich on Interpretation of Statutes, secs. 280, 287, and Locke v. New Orleans, 4 Wall. (U. S.) 172, 18 L. Ed. 334.

Therefore, under the definition given by the supreme court, the question which will determine this application is whether a new right has been given by the enactment of the amendment quoted.

While at first it might seem that the legislature has created a new right which did not exist before, we must interpret the law in the light of the former decisions of the supreme court, where it has been held that executors' compensation is not payable until the settlement of the final account, because the commissions cannot until that time accurately be calculated.

These decisions, however, concede that the compensation of the executor is being earned throughout the entire administration of the estate, but hold that payment at any time before the settlement of the final account is inexpedient. By this amendment the legislature has provided for part payment of the executor's compensation at an earlier time.

It is, therefore, merely a matter which affects the remedy of the executor, and in giving the amendment application to pending estates, we are not giving it retroactive operation.

This proposition was before the supreme court of California in Swamp Land District Co. v. Glide, 112 Cal. 85, 44 Pac. 451.

There an assessment was levied under section 4366 of the Political Code, which provided at the time that the board of trustees should begin suit for such assessment at a certain time. The section was subsequently amended to provide for a suit at a different time. The supreme court held that the amendment operated upon assessments which had been levied before the amendment was enacted; that so applying it was not giving it a retroactive operation; that the amendment

"merely changed the mode of procedure for collection by providing for installments and by changing the time when cause of action accrues."

We shall now cite cases in the supreme court of California, and in other states, where it has been decided that laws which are remedial in their nature should be applied to pending proceedings, and that such application is not giving the law a retroactive force.

In Gilman v. County of Contra Costa, 6 Cal. 676, concerning an act which permitted suit to be brought against counties, it was sought to give it an application to a contract that had been made and performed prior to the passage of the act. It was argued that if the act were construed to give the plaintiff the right to maintain an action against the county upon a demand which accrued entirely before its passage, it is open to the objection that it impairs the vested right enjoyed by the county in its sovereign nature of exemption from actions, and of its power to postpone payment or refuse to pay at all. It was further argued that the act was not remedial and cannot have such retrospective effect as to create a legal liability on the part of the county to perform what before the passage of the act was only the duty of the county to perform. The court held that the act applies as well to claims existing before its passage as to those which arose afterward: Bensley v. Ellis, 39 Cal. 309.

In Dent v. Holbrook, 54 Cal. 145, the complaint was filed on March 6, 1877, for the conversion of stock. Section 3336, Code of Civil Procedure, which provided for the damages to be recovered in such an action, was amended January 22, 1878. The court held that the rule of damages depends upon the statute as amended.

Oullahan v. Sweeney, 79 Cal. 537, 12 Am. St. Rep. 172, 21 Pac. 960, held that an act amended in March, 1885, so as to require the purchaser of property sold for delinquent taxes to serve notice on the owner before application for a deed, affected the remedy only and applied to a sale made in February, 1885, before the amendment was passed.

Kerckhoff-Cuzner Mill & Lumber Co. v. Olmstead, 85 Cal. 80, 24 Pac. 648, held that the rights of a mechanic's lien claim-

ant were governed by the law as amended, though he furnished the materials before that time.

In Chapman v. State, 104 Cal. 690, 43 Am. St. Rep. 158, 38 Pac. 457, by reason of the negligence of the harbor commission, plaintiff had a cause of action against the state, but his only remedy was to present a claim. Subsequently by the act of February 28, 1893, the right to bring a suit against the state was given. It was held that the plaintiff could take advantage of this new law; that it did not create any new liability or cause of action, but merely gave an additional remedy, and is not, even as applied to prior contracts, in conflict with any provision in the constitution.

In Collier v. Shaffer, 137 Cal. 319, 70 Pac. 177, it appeared that at the time when a sale was made for delinquent taxes, the law provided that the county auditor should be paid by the redemptioner the sum of two dollars for making out the estimate; later, in 1895, the law was amended eliminating the fee. The court held that the amendment went to the remedy, and was operative upon the sale which had previously taken place.

In New York in Re Commissioner of Public Works, 11 App. Div. 285, 97 N. Y. Supp. 503, it seems that during the pendency of eminent domain proceedings, the law was amended so as to give the right of appeal for the first time from the report of the commissioners. The court held that the amendment applied to the case, being a provision governing practice: Myers v. Morgan, 113 App. Div. 427, 99 N. Y. Supp. 269; Litch v. Brotherson, 25 How. Pr. 407.

In New Hampshire, Hardy v. Gage, 66 N. H. 552, 22 Atl 557, was a case of probate proceedings. The case had construed the will of the decedent as limiting a remainder to her next of kin at the time of the death or her surviving child. Subsequent to the death of the testator and the administration proceedings, a statute was passed extending representation to grandchildren of brothers and sisters. The court held that the new law was operative in this case and determined who, at the time of the death of the surviving child, were the next of kin, and that it did not disturb any vested right.

In Indiana the court said in Connecticut Mutual Life Ins. Co. v. Talbot, 113 Ind. 373, 3 Am. St. Rep. 655, 14 N. E. 586; "Statutes are to be construed and applied prospectively unless a contrary intent is manifested in clear and unambiguous terms. This is undoubtedly the general rule: the better rule of construction, and the rule peculiarly applicable to remedial statutes, however, is that a statute must be so construed as to make it effect the evident purpose for which it was enacted; and if the reason of the statute extends to past transactions as well as to those of the future, then it will be so applied although the statute does not in terms so direct, unless to do so would impair some vested right or violate some constitutional guaranty. In ascertaining the intent of the legislature in the enactment of a statute, courts will take judicial notice of such contemporaneous history as led up to and induced the passage of the law."

The court then mentions the case in which it was declared that no statute existed in Indiana making provision for recording an assignment of mortgage, which case was decided May, 1875. At the ensuing session of the legislature, the act under consideration was passed.

"We have no doubt but that the act was intended to remedy the defect declared to exist in the registry law. . . . The reason and the policy of the act applied with as much force to assignments such as that herein involved as to those which should be made after it took effect."

The force of this case lies in the fact that the law there under consideration was passed for the purpose of remedying a defect in the existing law.

It will be remembered that at the hearing of this application, this court remarked that the purpose of the amendment of section 1616, Code of Civil Procedure, was to destroy the effect of the Estate of Hite, Deceased, decided by the supreme court of California. The case next referred to involves the same point. It is also a case where the new law was held to operate in the matter of probate proceedings.

In Minnesota a law was passed in 1897 providing that "when any person shall die intestate, where administration shall not have been granted for five years from the death of

the decedent," any heir or grantee may institute certain proceedings. It was objected to the application of this law that the decedent died in 1861, and further that five years had not elapsed since the enactment of the statute, but the court held that it had no doubt that the elimination of difficulties arising from the failure to administer estates and obtain distribution was a legislative reason for the enactment. The word "shall" is often used in remedial statutes, in a general sense, including past as well as future. The act being designed to give a remedy for existing rights, must be liberally construed in order to accomplish the beneficent purpose for which it was enacted, and should be applied to rights and obligations that accrued before its enactment as well as to those to accrue thereafter: Fitzpatrick v. Simonson, 86 Minn. 140, 90 N. W. 378.

In Michigan, in Miller v. Davis, 106 Mich. 300, 64 N. W. 338, in order to establish their title, defendants introduced in evidence proceedings had under the act No. 5990 in 1880, to determine the heirs of one Joseph St. Andre. It was objected that the act was prospective, and that St. Andre had died in 1825, long prior to the passage of the act, but the court held that the act was remedial and took away no vested rights, being to secure the determination of heirship, and therefore was applicable: Vansandt v. Hobbs, 84 Mo. App. 628; Johnson v. Bradstreet Co., 87 Ga. 79, 13 S. E. 250; Phoenix Ins. Co. v. Shearman (Tex. Civ.), 43 S. W. 1063.

Application granted.

ESTATE OF SIGISMUND STRASSBURGER, DECEASED.

[No. 5941 (N. S.); November, 1908.]

Executors—Compensation.—Manner of fixing commissions stated.

John M. Burnett, inheritance tax appraiser.

COFFEY, J. In this matter the following property will be distributed in kind, and "will involve no labor beyond the custody and distribution of the same":

30 shares stock Bank of California, valued at..... .....$ 9,900.00
25 shares stock Rosenbaum Estate Co., valued at..... ..... 12,500.00

$22,400.00

As the entire estate is $40,119.39, it will be observed that the stock alone is greater in value than the excess over the $20,000 mentioned in section 1618, Code of Civil Procedure. It will further be observed that 30 shares of the stock of the Bank of California has been sold for $9,442.50, and the proceeds, together with money in hand, will be almost all expended in payment of claims and expenses of administration.

In calculating the commissions, I have included the proceeds of the stock sold, together with the money on hand, in the first $20,000, allowing full commissions thereon, and included $20,119.39 of the value of the stock distributed in kind in the "estate above the value of twenty thousand dollars," and allowed only half rates.

Thus the executor has full rates on all the estate not distributed in kind and such portions of the estate that are distributed in kind as are required to make the aggregate of $20,000, and has half rates on the remaining estate distributed in kind, and involving "no labor beyond the custody and distribution thereof." This is just to the executor, and just to the beneficiaries: See Estate of Clark, 3 Cof. Prob. Dec. 214.

The following is the basis on which the commissions are calculated:

On $1,000 at 7%, $70.00—Full rates.
On $9,000 at 4%, $360.00—Full rates.
On $10,000 at 3%, $300.00—Full rates.
On $20,119.39 at 1%, $210.19—Half rate.

$40,119.39	$931.19

October 28, 1908.
Report confirmed.

ESTATE OF JAMES W. CUDWORTH, DECEASED.

[April 30, 1900.]

Executors—Commissions—Property Set Apart as Homestead.—The setting apart of a house and lot by the court as a homestead does not affect or impair the executor's right to commissions thereon.

Executors—Commissions—Extent of Right.—The executor is entitled to full commissions on all the estate not distributed in kind, or not involving for him labor beyond its mere custody, and, besides this, on property, to the extent of twenty thousand dollars, that is distributed in kind and does not involve such labor for him.

Knight & Heggerty, for Royal Wallace Cudworth, contestant and objector.

A. N. Drown, for executor, Gay Allender Rosenberg.

COFFEY, J. Royal W. Cudworth, one of the heirs, has made and filed certain objections to the items of commissions contained in the executor's final account.

These commissions, as is evident from an inspection of the account, are upon "the amount of the estate accounted for" at the statutory rate.

The will was filed May 19, 1898, and it was admitted to probate and letters testamentary were issued on the 2d day of June, 1898. On July 15, 1898, the executor duly returned an inventory and appraisement of the property now accounted for. Subsequently, on the widow's petition, a certain lot with the dwelling-house thereon was, to wit, on the 3d day of August, 1898, set apart as a homestead.

The first objection is to the allowance of commissions on the property set apart as a homestead which was appraised at $9,000.

The order finds "that during the lifetime of said deceased, no homestead was selected, designated or recorded" by either spouse. Until, therefore, this property was selected, designated and set apart by the court as a homestead, it stood in the same case as all of the other property of the decedent

and it remained and was a portion of the general assets of the estate. The executor became chargeable with it in common with the other property of the decedent and was obliged to list it in his inventory. Even if it had been covered by a homestead, duly declared by the decedent in his lifetime, it would have been inventoried and appraised just the same. The executor is compelled to list "all of the estate of the decedent, including the homestead, if any, which has come to his possession or knowledge": Code Civ. Proc., sec. 1443. Having returned it as property of the estate, he became accountable for it on his bond and in his accounts, whether he reduced it to possession or not. If it came to his "knowledge," he was required to list it equally with property which came immediately to his possession; and afterward, in due time, he would have been compelled to reduce it to possession if the court had not made previous disposition of it. He was compelled to charge himself with it and all other property in his final account at the value of the appraisement thereof contained in the inventory: Code Civ. Proc., sec. 1613.

Having been thus responsible for it, and having thus "accounted for" it (Code Civ. Proc., sec. 1618), it is plain that he is entitled to commissions on its value.

The general rule is that an executor or administrator is entitled to commissions on all of the property of the estate which comes into his hands as assets and is accounted for by him: 11 Am. & Eng. Ency. of Law, 191.

The setting apart of this house and lot as a homestead by the court does not in any way affect or impair the executor's right to commissions thereon: In re Estate of Isaacs, 30 Cal. 112, 113.

The next objection is to the allowance of any commissions upon said estate above the value of $20,000 in excess of one-half of the rates fixed in section 1618, Code of Civil Procedure.

The ground of this objection as given by counsel is "that the property of the estate is to be distributed in kind, and

involved no labor beyond the custody and distribution of the same." The statutory provision referred to is as follows:

"When the property of the estate is distributed in kind, and involves no labor beyond the custody and distribution of the same, the commissions shall be computed on all the estate above the value of $20,000, at one-half of the rate fixed in this section."

The general rule is as above stated. If counsel desire to escape this general provision and get the benefit of the proviso or exception thereto, they must bring their facts within its language and intent. The part of the section quoted does not say, and does not mean, that when any particular piece or item of the property is distributed in kind commissions are only to be allowed at half rates on its appraised value in excess of $20,000. It says, and can only mean, that when the entire property of the estate is distributed in kind, commissions must be so computed, providing always that nothing has been done touching any part of it other than to hold and distribute it.

Counsel have left the court to examine the inventory and the executor's account and report and to ascertain therefrom item by item, whether the whole estate and every part of it is to be turned over in kind exactly as received, and has had nothing done concerning it by the executor except to keep and distribute it. If any part of it is real estate and has involved the labor of letting or collecting rents, or repairing improvements, or keeping buildings insured, or paying taxes, the estate—the whole property of the estate—does not come within the statutory provision referred to. If any part of it consists of a note or a note and mortgage which have been enforced by the executor, on which interest has been collected, indorsements made, satisfaction executed, then the rule cannot apply. If any part of it consisted in stocks on which assessments had to be paid or dividends were collected, then it has involved labor other than that of mere custody and distribution, and the general rule must be applied. If any part of the estate has consisted of claims or demands which

are now represented by the proceeds thereof in the form of money or property, then the full rate on the entire amount of estate accounted for must be allowed.

That this is a reasonable and necessary construction of this statute is plain.

The statute does not provide, and is not to be construed as providing, that if so much or that portion of the estate which exceeds in value $20,000 is distributed in kind and involves no labor, the commissions thereon shall be computed at half rates. Nor does it say that, in an estate exceeding in value $20,000, the commissions on that portion thereof which is distributed in kind and involves no labor, shall be computed at half rates.

If it did, then the practice pursued by this court, and by all the courts of this state, sitting in probate, in allowing commissions, has been erroneous and contrary to law from the beginning. Except in insolvent estate, it would be almost impossible to find an estate which has been here administered upon, in which some portion thereof—some particular piece of property belonging thereto—has not been distributed in kind and involved no labor. And yet, in all such estates, there has heretofore been no apportionment or segregation of the properties for the purpose of computing commissions; but they have been computed on the whole amount of estate accounted for at full rates, wherever any portion of the property had involved labor or was not distributed in kind.

If the statute were to be construed as applying to any estates except those in which all the property is distributed in kind and involves no labor, confusion and difficulties would at once arise in apportioning and segregating the properties for the purpose of computing commissions. The statute points out no method or rule for making such apportionment. There is no provision made for dividing the properties into two classes or portions, namely:

Class 1. Those which involved labor beyond their mere custody, or which are not distributed in kind; and

Class 2. Those which involved no labor and are distributed in kind.

If, for the purpose of computing commissions, the properties are to be so divided, then from which of these classes is the $20,000 dollars exempted from the rule to be taken?

There is no question but that the executor is entitled to his full commissions on all that portion of the estate which is not distributed in kind, or which did involve labor beyond its mere custody, that is, on all of the property within class 1. The exemption of $20,000 cannot, therefore, refer to this class.

But the legislature has manifested a clear intention that on property to the extent of $20,000, which is distributed in kind, and which did not involve any labor, the executor shall receive his full commissions.

If it be contended, then, that as to all estates exceeding in value $20,000, the statute is to be construed as requiring a computation of commissions on one portion of the estate (class 1) at full rates, and on another portion (class 2) at half rates, it follows, as a matter of course, that the $20,000 exemption is to be taken from class 2. For, it is impossible to place such a construction on the statute without reading it substantially as follows: "In estates exceeding in value $20,000, where any portion of the property is distributed in kind and involves no labor beyond the custody and distribution of the same, the commissions shall be computed on all that portion of the estate above the value of twenty thousand dollars, at one-half the rates fixed in this section."

Hence, if the rule of half commissions has any application or reference to any estate except to those in which all and every part of the property is distributed in kind and involves no labor, if it means that the property of an estate exceeding $20,000 in value, for the purpose of computing commissions, is to be divided into two classes, then it follows that in all estates where such a division and computation becomes necessary, the $20,000 exemption would be utterly without meaning unless it applied to class 2.

This being so, the contestant in this case, in order to reduce the amount of executor's commissions must show clearly and directly the following facts, namely: (1) What portion and how much of the estate falls within class two, on which commissions are to be computed at half rates, and (2) how much, if any, of that portion exceeds in value $20,000.

He has not attempted to do so. There is no showing before the court that the properties of this estate which are to be distributed in kind and involved no labor, and consequently fall within class 2, exceed in value $20,000.

Of course, even if such a showing had been made, unless the statute may be construed as authorizing such a division of the properties of an estate into two classes and a computation of commissions at different rates on each class, as is above referred to, it would be wholly insufficient. Counsel for contestant virtually conceded the correctness of the executor's position and contention, to wit, that the statute only applied to estates in which all the property is distributed in kind and all thereof involved no labor; and that there was and is no such thing contemplated by law as a division of the property into classes, and a computation of commissions at full rates on one class and at half rates on the other class.

The language of the statute is plain and in no way ambiguous. It provides that in a certain specific class of estates, the commissions shall be computed at half rates on all of the property. Unless this estate falls within that class, the statutory provision invoked by counsel does not apply to it. The class of estates referred to includes all those, and only those, estates in which (1) the value thereof exceeds the sum of $20,000, and (2) all the property thereof is distributed in kind and involves no labor beyond the custody and distribution of the same.

If any part of the property of this estate is not "distributed in kind," or if any part thereof involved any labor beyond its mere "custody and distribution," then this estate is not within the class of estates to which this portion of the statute refers or applies.

Inspection of the inventory and account shows that this estate does not fall within the class mentioned and referred to in the statute.

It is true that counsel for contestant contended before this court that, in this estate, all the property, without a single exception, was to be turned over and distributed in kind, and had involved no labor beyond its mere custody; and to support this contention, advanced the proposition that the collection of debts due the decedent, the enforcement and collection of notes and mortgages, the collection of rents from numerous tenants occupying some twenty or more separate tenements contained in fifteen distinct buildings, the finding of new tenants and the letting and reletting of tenements, the keeping in repair of a large number of old buildings, attending to and inquiring into the validity of street assessments, taxes, liens, and charges ascertaining and determining the genuineness and validity of six different claims presented against the decedent, attending to the transfer and exchange of stocks and bonds, and all the labor incidental to the protection and management of the properties constituting the assets of this estate, the collection of the income, issues and profits thereof, did not, either separately or all together, involve any labor, but all came within the definition and meaning of the term "custody" of the property; but counsel cited not a single authority in support of this proposition, simply stating that, as there had been no litigation concerning the assets or properties of this estate, there had been no labor involved in their custody. If any such rule as this exists, or should become established, or should be advanced by this court—if litigation were the test of the executor's labor and right to commissions—there would be an end forever to the peaceful, economical, prudent and wise administration of estates, and the courts would be inundated beneath a flood of litigation. Every executor and administrator would be tempted to indulge, in his official capacity, in the luxury of litigation at the expense of the estate—know-

ing that in no other way could he earn the full commissions. Nothing would have been easier for the executor in this estate than to have brought numerous foreclosure suits and a variety of actions to quiet title. Circumstances sufficient to justify such action on his part could easily have been raised; and, indeed, but for his prudence and good judgment and diplomacy, such action would more than once have become necessary. He might also have indulged in litigation concerning the calling in of the old stock, and the issuance of new stock, of the Pacific Lighting Company, or concerning the surrender and exchange of the old bonds of the Los Angeles Lighting Company; or he might have stubbornly defended the action to quiet title brought against him as executor to which he referred in his testimony, and so involved the estate in tedious and useless litigation. But he did none of these things. Instead, he labored hard to, and succeeded in, adjusting all these matters in a wise, equitable and amicable manner, entirely to the pecuniary advantage and profit of the estate and of all persons interested therein.

Again, the record shows that very many of the properties of this estate will not be, and cannot be, distributed in kind; and this fact alone disposes of the whole question. Thus, of the eleven promissory notes and mortgages received by this executor, five have been collected in full by him, the notes surrendered and the mortgages satisfied; and on each of the other six, interest and considerable portions of the principal have been collected. Counsel, to overcome this fact, advanced the further and additional proposition that, where a note and mortgage are received by an executor, and by him enforced and collected, the distribution of the moneys so collected is a distribution of the note and mortgage in kind. Unless this proposition is absolutely correct and sound, he admits that this estate does not belong to the class to which the rule of half commissions applies. This view of counsel is neither sound nor specious.

Even the six notes which have been collected in part cannot be turned over by the executor in the same condition in

which they were received by him. Then, again, the five bonds of the Los Angeles Lighting Company originally received by the executor were, after due proceedings had, by him surrendered, and they cannot now be distributed in kind. He now holds in place and lieu thereof five other and different bonds. The same is true, also, in some respects of the original one hundred and fifteen shares of stock of the Pacific Lighting Company, in lieu of which he now holds shares of a new and different issue. He has also been called upon, in the course of his administration, to collect more than $7,000 in rents and dividends and interest, and to disburse more than $7,000 in paying the debts of the decedent, and in and about the preservation and management of the properties of the estate; all of which involved considerable labor.

The nature and condition of the assets of this estate have been such as to entail upon the executor far more labor than usually pertains to the administration of an estate of this size; and whether or not it shall at any time become necessary to establish a new rule of practice in computing executor's commissions, and to read into the statute a meaning which cannot now be found within its terms, this estate does not call for the establishment of that rule or for any such interpolation into the statute of anything not now contained therein in order to advance any abstract principle of justice, or for any other purpose. On the contrary, it is clearly established that the executor has faithfully and industriously discharged the duties of his trust in administering this estate and protecting, preserving and managing the properties thereof, and that he has spared no labor or pains in promoting the interests of the estate.

The account is a long one, and shows on its face the labor to which the executor has been put in managing the estate; and the fact that among all the items of this long account, and the transactions involved in their receipt and disbursement, not one can be found which can be made the subject of criticism or contest by the present contestant, excepting only this item of executor's commissions shows how faithfully

and carefully the executor has managed the estate and discharged his duties.

The foregoing contains an accurate exposition of the law on the issue raised by the contestant, and for the reasons therein given the objections are overruled and full commissions are allowed to the executor as estimated in his account.

ESTATE OF PETER LAMB.

[No. 9488 (N. S.); October, 1910.]

Will—Community Property.—A Widow Need not Elect, as between her community interest and her interest under the husband's will; she may take both.

Will—Community Property.—A General Devise of All the Property a testator may die possessed of, without any specific property being named, applies to but his moiety of the community property, if a married man.

Trust—Jurisdiction to Determine Validity on Partial Distribution. Upon the ordinary notice in a partial distribution proceeding, the court has jurisdiction to determine upon the validity of a trust clause, in a will, in favor of minors absent from the state.

Infant—Conclusiveness of Judgment—An Infant can be Bound without having his day in court, and is as much bound as a person of full age by a decree in equity, the same grounds being available to both for disputing it.

Guardian Ad Litem—Probate Proceeding.—The Code Sections providing for the appointment of guardians ad litem are not applicable to probate proceedings.

Trust.—An Express Trust Should Define its subject, purpose and beneficiary, and also its duration in regard to time.

Jurisdiction of court to declare invalidity of trust in favor of absent minors upon petition for partial distribution without further notice than that required to be given by sections 1659 and 1633, Code of Civil Procedure.

George W. Lane and Leo C. Tuck, for petitioner.

Page, McCutchen & Knight, for executor, of counsel.

COFFEY, J. The estate is appraised at $20,813.39.

The inventory and appraisement show the following items:

One parcel real property	$8,500.00
Policy of insurance payable to estate	2,430.00
436 shares Pacific Oil Field stock	2,180.00
Interest in Balfour-Guthrie & Co.	7,000.00
Fox Tail stock	100.00
Cash	344.74
Yacht	325.00

The will, in its essential features, is as follows:

Bequeaths one-half of the estate to Annie Maria Lamb, the widow.

Bequeaths one-fourth of the estate to Mrs. Losee, a sister.

Bequeaths one-fourth of the estate to Miss Lamb, an unmarried sister.

Further on in the will it is said:

"The share that goes to my sister Agnes (Mrs. Losee) is to be held in trust by her for my nephews, Edwin Lamb Losee and James K. Losee, and niece, Agnes Mary Marian Losee, equally."

By order of this court heretofore made, the parcel of real property appraised at $8,500 was set apart to the widow absolutely as a probate homestead.

Subtracting this item from the inventory there remains in the estate approximately $12,300.

The will also contains a specific bequest of the policy of life insurance made payable to the estate and appraised at $2,430, to the widow. Substracting this, there remains in the estate proper approximately $10,000.

The total expenses of administration, including claims presented against the estate, commissions, etc., are estimated at $2,800. Subtracting this amount there remains in the descendible portion of the estate, approximately $7,000.

Upon this basis of $7,000 we must proceed to determine the amounts due to the general legatees. The will is one that comes within the principle laid down in the case of In re Gilmore, 81 Cal. 240, 22 Pac. 655, wherein it is held that: "A general devise of all the property of which the testator may die possessed without naming any specific property, applies only to his moiety of the community property."

The widow is not compelled to elect whether she will take her community interest or her interest under the will, but may take both: See, also, Estate of Stewart, 74 Cal. 98, 15 Pac. 445; Estate of Smith, 108 Cal. 115, 40 Pac. 1037; Estate of Silvey, 42 Cal. 210.

Therefore, of the $7,000 above referred to the widow takes one-half as her community interest. Subtracting this half, to wit, the sum of $3,500, it will appear that but $3,500 of the estate was subject to the testamentary disposition of the deceased at the time of his death. Of this $3,500, therefore, Mrs. Lamb, the widow, takes one-half and the two sisters take a quarter apiece, or the sum of $875 each.

Both of the sisters have assigned their interest to Mrs. Lamb, the widow, petitioner herein.

The basis of the petitioner's claim upon the estate may be summed up as follows:

1. Absolute homestead.....$8,500
   (This has already been given to her.)
2. Specifically bequeathed insurance policy..... 2,430
3. Community interest..... 3,500
4. Interest under will..... 1,750
5. Interest assigned by Miss Lamb..... 875
6. Interest assigned by Mrs. Losee..... 875

By the petition, it is sought to have the court distribute to Mrs. Lamb the sum of $7,000, more particularly the item noted in the inventory as "interest in Balfour-Guthrie & Co.," appraised at $7,000.

THE STATUTORY NOTICE HAVING BEEN GIVEN, THE COURT HAS JURISDICTION, AND MINORS AS WELL AS ADULTS ARE BOUND.

Upon the first hearing of the petition the question was raised as to whether in this proceeding and upon the ordinary notice in a partial distribution proceeding, the court has jurisdiction to determine the invalidity of a trust clause in the will in favor of minors absent from the state.

Section 1659, Code of Civil Procedure, which defines the notice to be given of the hearing of a petition for partial distribution, provides as follows: "Notice of the application must be given to the executor or administrator, personally, and to all persons interested in the estate, in the same manner that notice is required to be given of the settlement of the account of an executor or administrator."

The notice that is required to be given to all persons interested in the estate by the above section is said to be the same as that required upon the settlement of an account of an executor or administrator. The notice required upon such an occasion is defined by section 1633, Code of Civil Procedure.

Section 1633, Code of Civil Procedure, is as follows: "When any account is rendered for settlement, the clerk of the court must appoint a day for the settlement thereof, and thereupon give notice thereof by causing notices to be posted in at least three public places in the county, setting forth the name of the estate, the executor, or administrator, and the day appointed for settlement of the account. If, upon the final hearing at the time of settlement, the court, or a judge thereof, should deem the notice insufficient from any cause, he may order such further notice to be given as may seem to him proper."

There being no other statutory requirements for notice, and partial distribution being entirely a statutory matter, it must be held that the court has full and complete jurisdiction if the requirements of the above sections are fulfilled.

The executor was served with a duly issued citation, proof of service of which is on file. So, also, notice was posted pursuant to section 1633.

That nonresident legatees are bound by decree of partial distribution the requirements of sections 1659 and 1633 having been met, although they have had no personal notice, is held in In re Jessup, 81 Cal. 409, at page 437, 21 Pac. 976, 22 Pac. 742, 1028, 6 L. R. A. 594, where the question was fully discussed.

It is held in Hodgdon v. Southern Pac. Ry. Co., 75 Cal. 642, at page 648, 17 Pac. 928, that where the statutory requirements of a guardianship proceeding are met, all parties are bound thereby, including minors as well as adults, and the case of Joyce v. McAvoy, 31 Cal. 274, 89 Am. Dec. 172, is cited to this effect. In the latter case the question was thoroughly discussed and gone into as to whether under the law of California an infant can be bound without having been allowed a day in court, and the conclusion was reached that an infant defendant is as much bound by a decree in equity as a person of full age and will not be permitted to dispute it except upon the same grounds as an adult might have disputed it.

It is to be noted that under section 1633 the court may, upon final hearing, should it deem the notice given insufficient from any cause, order "such further notice to be given as may seem proper." But having proceeded under the sections and complied with the requirements, the petitioner has sustained the jurisdiction of the court. Whether the court shall exercise the discretion given to it by the section to order a further notice to be given may be determined by the court from all the circumstances.

With regard to the exercise of this discretion it is pointed out that it is the mother of these minors who will receive the money in the event of the court's declaring the trust invalid; that the trust sought to be declared invalid is invalid upon its face. Further, that the only result of such an exercise of the court's discretion would be to compel someone to expend

money in behalf of these minors for the vain purpose of giving them a chance to be on hand when the court declares what it must know from the beginning, to wit, that the trust is void.

It might be that were it possible for the court to appoint a guardian ad litem for these minors, such a proceeding would be a proper exercise of the court's discretion, but in the case of Carpenter v. Superior Court, 75 Cal. 596, 19 Pac. 174, it was held that the sections of the Code of Civil Procedure, providing for the appointment of guardians ad litem, were inapplicable to probate proceedings. Again, were it still possible for the court to appoint attorneys to represent the minors under section 1718 of the Code of Civil Procedure, that method would be a judicious exercise of the court's discretion under the present circumstances. But section 1718 of the Code of Civil Procedure having been repealed in 1903, that course is excluded.

The only thing would be that the court should compel the appointment of general guardians for these minors, and in the present circumstances no useful purpose could be served.

THE ATTEMPTED TRUST INVALID WITHOUT QUESTION.

Referring to the provision in the will attempting to create a trust in favor of Mrs. Losee's children, it is apparent that it fails to create a valid trust.

Section 2221 of the Civil Code of California reads as follows:

"Voluntary Trust, How Created as to Trustor.

"Sec. 2221. Subject to the provisions of section eight hundred and fifty-two, a voluntary trust is created, as to the trustor and beneficiary, by any words or acts of the trustor, indicating with reasonable certainty:

"1. An intention on the part of the trustor to create a trust; and

"2. The subject, purpose, and beneficiary of the trust."

Subdivision 2 makes it necessary that an express trust should define its subject, purpose and beneficiary. The at-

tempted trust in the will names beneficiaries, the subject matter is clear, but there is absolutely nothing stated as to the purpose, and were there no other objections to urge against the trust than this, it is apparent that it would fail. In the words of McCloud v. Hewlett, 135 Cal. 361, 67 Pac. 333, a trust that does not express its purpose, besides being violative of section 2221, Civil Code, is "without rudder or compass."

Neither is the duration of the attempted trust defined, which is likewise an essential element.

Wittfield v. Forster, 124 Cal. 418, which says at page 421 (57 Pac. 219): "The duration of the estate attempted to be granted to the trustee, the nature and quantity of interest which the beneficiaries are to have, and the manner in which the trust is to be performed, are all left undeclared and without any reasonable certainty; and, of course, there is no statement of any of the purposes for which under section 857 an express trust may be declared. And this uncertainty also makes the attempted trust as to the personal property void": See, also, McCloud v. Hewlett, 135 Cal 361, 67 Pac. 333; Barker v. Hurley, 132 Cal. 21, 63 Pac. 1071, 64 Pac. 480.

THE PETITIONER, AS THE WIDOW, MAY PETITION FOR HER SHARE OF THE ESTATE ON PARTIAL DISTRIBUTION.

It is suggested that there might be some question of the court's jurisdiction to grant to the widow the portion of the estate to which she is entitled by an assignment upon partial distribution.

Section 1658, which grants the right to partial distribution, grants that right only "to any heir, devisee, or legatee."

It is held in the Estate of Donahue, 1 Cof. Prob. Dec. 186, that a widow is an heir within the meaning of this section. Further, the section does not in terms limit the right to partial distribution to any restricted portion of the estate, but limits the right to certain classes of individuals. If the petitioner is within one of those classes, as in the present case, she may ask, in the words of the section, "for the legacy or share of the estate to which he is entitled, or any portion thereof."

In this case, the right of the petitioner to the portion of the estate for which she is asking partial distribution, is based, one-half upon her community interest, one-fourth upon her interest as legatee under the will, and to the extent of two-eighths upon two assignments from other legatees.

While it has never been held that an assignee of an heir, devisee or legatee can petition for partial distribution, although it has been asserted that such construction should be judicially made on the strength of section 1678, Code of Civil Procedure, as amended in 1909, nevertheless, the widow in the present case, having the right to petition, is entitled to the full measure of her interest in the estate. Nothing in this contention can be deemed contrary to the doctrine laid down in the cases of In re Letellier, 74 Cal. 311, 15 Pac. 847, and Alcorn v. Buschke, 133 Cal. 658, 66 Pac. 15, which simply go to the point that an executor or an administrator may not petition for partial distribution.

It is further suggested that even were the amount petitioned for distributed to the petitioner, she will still have a large distributable interest left in the estate, inasmuch as the proceeds of the insurance policy, which is specifically bequeathed to her, amounting to $2,430.00, have been collected by the executor, and are, with the consent of the petitioner, being applied by him towards the payment of debts and expenses of the estate.

Counsel call the court's attention to the fact that the statement in the inventory and appraisement that all the property of the estate is separate property of the deceased, is incorrect. At the time the appraisement was made, the appraisers were informed from apparently reliable sources that such was the case, and, were perhaps led into this belief from the circumstances that the deceased was married only three years prior to the time of his death and the properties in the estate were larger than one would reasonably suppose could be accumulated in such a short time. The question whether the estate did really consist of separate or community property became the essential point in determining the rights

of the widow upon her petition for probate homestead, and the thorough investigation made at the time showed conclusively that practically all of the estate was community property.

For the reasons foregoing, the court concludes that the application should be granted.

WHEN A WIDOW IS BY A WILL REQUIRED TO ELECT BETWEEN ITS BENEFITS AND HER RIGHT TO DOWER OR IN THE COMMUNITY PROPERTY.

General Common-law Doctrine.—Every married woman has an interest in the lands of her husband. Of this she cannot be devested but by her own act or consent. If he makes a provision for her by his will, she has her election to take the testamentary provision or to claim her legal provision. If the provision in the will is an ordinary bequest or devise, and is not expressed to be in lieu of dower, she is entitled to take under the will and also claim the estate the law gives her. But while a husband has no direct control of his wife's right to dower, he may offer her, by testamentary gift, something in place of it, and thereby put her to an election. In this event she cannot have both, and her acceptance of the gift bars her dower. However, a testamentary provision, when accepted by her, does not defeat her right to dower, unless the intention of the testator that the provision shall be in lieu of dower is shown by a declaration of the will to that effect, or is clearly deducible from its terms. The presumption is that a devise or bequest is in addition to, and not a substitute for dower: Hilliard v. Binford, 10 Ala. 977; Thompson v. Betts, 74 Conn. 576, 82 Am. St. Rep. 235, 51 Atl. 564; Kinsey v. Woodward, 3 Harr. (Del.) 474; Warren v. Morris, 4 Del. Ch. 289, 300; Tooke v. Hardeman, 7 Ga. 20; Speer v. Speer, 67 Ga. 748, 752; Cain v. Cain, 23 Iowa, 31; In re Estate of Blaney, 73 Iowa, 113, 34 N. W. 768; Franke v. Wiegand, 97 Iowa, 704, 66 N. W. 918; Shaw v. Shaw, 2 Dana, (Ky.), 341; Timberlake v. Parish, 5 Dana (Ky.) 346; Bailey v. Duncan, 4 T. B. Mon. (Ky.) 256; Bayes v. Hawes, 24 Ky. Law Rep. 281, 68 S. W. 449; Johnson v. Johnson, 32 Minn. 513, 21 N. W. 725; McGowen v. Baldwin, 46 Minn. 477, 49 N. W. 251; Wilson v. Cox, 49 Miss. 538; Brown v. Brown, 55 N. H. 106; Godman v. Converse, 43 Neb. 463, 61 N. W. 756; Norris v. Clark, 10 N. J. Eq. 51; Church v. Bull, 2 Denio, 430, 43 Am. Dec. 754; Bull v. Church, 5 Hill, 206; Fuller v. Yates, 8 Paige, 325; Matter of Accounting of Frazier, 82 N. Y. 239; Evans v. Webb, 1 Yeates (Pa.), 424, 1 Am. Dec. 308; Borland v. Nichols, 12 Pa. St. 38, 51 Am. Dec. 576; Melizet's Appeal,

17 Pa. St. 449, 55 Am. Dec. 573; Durfee, Petitioner, 14 R. I. 47; Braxton v. Freeman, 6 Rich. (S. C.) 35, 57 Am. Dec. 775; Hall v. Hall, 8 Rich. (S. C.) 407, 64 Am. Dec. 758; Jarman v. Jarman, 4 Lea (Tenn.), 671; Wiseley v. Findlay, 3 Rand. (Va.) 361, 15 Am. Dec. 712; Higginbotham v. Cornwell, 8 Gratt. (Va.) 83, 56 Am. Dec. 130; Nelson v. Kownslar, 79 Va. 468; French v. Davies, 2 Ves. 572; Ellis v. Lewis, 3 Hare, 310.

"It is a maxim in a court of equity," said Chief Justice Marshall, in Herbert v. Wren, 7 Cranch, 370, 377, "not to permit the same person to hold under and against a will. If, therefore, it be manifest, from the face of the will, that the testator did not intend the provision it contains for his widow to be in addition to her dower, but to be in lieu of it, if his intention discovered in other parts of the will must be defeated by the allotment of dower to the widow, she must renounce either her dower or the benefits she claims under the will. But if the two provisions may stand well together, if it may be fairly presumed that the testator intended the devise or bequest to his wife as additional to her dower, then she may hold both."

An express provision in a will in lieu of dower puts the widow to her election, and if accepted with a proper understanding of her position, bars the estate which the law gives her: Collins v. Wood, 63 Ill. 285; Knighton v. Young, 22 Md. 359, 373; In the Matter of Vowers, 113 N. Y. 569, 21 N. E. 690; Lee v. Tower, 124 N. Y. 370, 26 N. E. 943; Nelson v. Brown, 144 N. Y. 384, 39 N. E. 355; Chapin v Hill, 1 R. I. 446; Johnson v. Johnson, 44 S. C. 364, 22 S. E. 417. The same result may be effected, however, by implication. Where the provisions of the will manifest a clear and unequivocal intention on the part of the testator to bar his wife's dower, this is sufficient, without express words, to put her to her election. An implied intention may be deduced by showing that the claim of dower is inconsistent with the will and repugnant to its dispositions, or some of them, or that to allow dower would disturb, disappoint, or defeat the plain purpose of the testator, as shown by the whole will. The intention of the testator is the guide, and no particular form of words or technical terms are necessary to the expression of such intention: Helm v. Leggett, 66 Ark. 23, 48 S. W. 675; Lord v. Lord, 23 Conn. 327; Alling v. Chatfield, 42 Conn. 276; Walker v. Upson, 74 Conn. 128, 49 Atl. 904; Stephens v. Gibbes, 14 Fla. 331; Hurley v. Melver, 119 Ind. 53, 21 N. E. 325; Snyder v. Miller, 67 Iowa, 261, 25 N. W. 240; Washburn v. Van Steenwyk, 32 Minn. 336, 20 N. W. 324; Fairchild v. Marshall, 42 Minn. 14, 43 N. W. 563; White v. White, 1 Harr. (N. J.) 202, 31 Am. Dec. 232; Stewart v. Stewart, 31 N. J. Eq. 398; Brokaw v. Brokaw, 41 N. J. Eq. 304; Savage v. Burnham,

17 N. Y. 561; Vernon v. Vernon, 53 N. Y. 351; Matter of Estate of Smith, 30 N. Y. Supp. 982, 10 Misc. Rep. 320; Koezly v. Koezly, 65 N. Y. Supp. 613, 31 Misc. Rep. 397; Pickett v. Peag, 3 Brev. (S. C.) 544, 6 Am. Dec. 594; Bamister v. Bamister, 37 S. C. 529, 16 S. E. 612; Hair v. Goldsmith, 22 S. C. 566; Callaham v. Robinson, 30 S. C. 249, 9 S. E. 120; Rutherford v. Mayo, 76 Va. 117; Atkinson v. Sutton, 23 W. Va. 197; Lawrence v. Lawrence, 2 Vern. 365; Strahan v. Sutton, 3 Ves. 249; Chalmers v. Storil, 2 Ves. & B. 222; Parker v. Sowerby, 4 De Gex, M. & G. 321.

But to bar her of dower by implication, the provisions of the will, or some of them, must be absolutely inconsistent with the claim of dower, so that the testator's intention will be defeated as to some part of the property devised or bequeathed to others, if she takes her dower, together with the testamentary provision. And to deprive the widow of dower, or to compel her to elect, it is not sufficient that the provisions of the will render it doubtful whether the testator intended she should have her dower in addition to the testamentary bounty, but the provisions of the will must be such as to show an evident intention on the testator's part to exclude the claim of dower: Sanford v. Jackson, 10 Paige, 266. It is not enough to say that upon the whole will it fairly may be inferred that the testator intended his widow should have no dower. To compel her to elect, the court must be satisfied that there is a positive intention that she is to be excluded from dower: Mills v. Mills, 28 Barb. 454. In the absence of an express declaration in the will that the provision therein is in lieu of dower, "mere intention of the testator to that effect, gathered from the will, is not enough to put the widow to an election. To make a case for election, he [Mr. Pomeroy] says 'that intention must have been shown or carried into operation by totally inconsistent gifts of the land subject to dower'": Stokes v. Pillow, 64 Ark. 1, 40 S. W. 580, citing 1 Pomeroy's Equity Jurisprudence, sec. 493; Adsit v. Adsit, 2 Johns. Ch. 448, 7 Am. Dec. 539, and other cases.

She will not be made to elect between her dower and the testamentary provision unless the implication to that effect is clear and manifest: Bennett v. Packer, 70 Conn. 357, 66 Am. St. Rep. 112, 39 Atl. 739; In re Klostermann, 6 Mo. App. 314; Leonard v. Steele, 4 Barb. 20; or is clearly deducible from the terms of the will: In re Estate of Franke, 97 Iowa, 704, 66 N. W. 918; or is unequivocally expressed: Hasenritter v. Hasenritter, 77 Mo. 162; Sheldon v. Bliss, 8 N. Y. 31. She is not put to her election unless the provisions of the will and her claim of dower are plainly or totally inconsistent: Thompson v. Betts, 74 Conn. 576, 92 Am. St. Rep. 235, 51 Atl. 564; Lasher v. Lasher, 13 Barb.

106. The inconsistency must be such as to disturb, defeat, interrupt, or disappoint some provision of the will: Hunter v. Hunter, 95 Iowa, 728, 58 Am. St. Rep. 455, 64 N. W. 656. She need not elect unless it is beyond reasonable doubt that the assertion of her dower right would prevent the giving full effect to the testator's intention: Dixon v. McCue, 14 Gratt. 540. The conclusion should be as satisfactory as if it were expressed: Douglas v. Feay, 1 W. Va. 26. The test is, whether the provision of the will and the claim of dower are so manifestly repugnant that they cannot stand together: Sumerel v. Sumerel, 34 S. C. 85, 12 S. E. 932.

It thus appears how high in the esteem of courts dower stands, and how reluctant they are to put the widow to an election between it and a testamentary gift. In the words of Justice Andrews: "Dower is favored. It is never excluded by a provision for a wife, except by express words or necessary implication. Where there are no express words, there must be, upon the face of the will, a demonstration of the intention of the testator that the widow shall not take both dower and the provision. The will furnishes his demonstration only when it clearly appears without ambiguity or doubt, that to permit the widow to claim both dower and the provision would interfere with the other dispositions and disturb the scheme of the testator, as manifested by his will. The intention of the testator cannot be inferred from the extent of the provision, or because she is a devisee under the will for life, or in fee, or because it may seem to the court that to permit the widow to claim both the provision and dower would be unjust as a family arrangement, or even because it may be inferred, or believed, in view of all the circumstances, that if the intention of the testator had been drawn to the subject, he would have expressly excluded dower. We repeat, the only sufficient and adequate demonstration which, in the absence of express words, will put the widow to her election, is a clear incompatibility, arising on the face of the will, between a claim of dower and a claim to the benefit given by the will": Konvalinka v. Schlegel, 104 N. Y. 125, 58 Am. Rep. 494, 9 N. E. 868. To the same effect, see Glaser v. Glaser, 74 N. Y. Supp. 395, 67 App. Div. 132.

Effect of Particular Testamentary Provisions—Devise of Life Estate.—A devise by a testator of all his property to his wife for life is not inconsistent or incompatible with her claim of dower, and does not put her to an election unless given in lieu of dower, either expressly or by necessary implication: Potter v. Worley, 57 Iowa, 66, 7 N. W. 685, 10 N. W. 298; Daugherty v. Daugherty, 69 Iowa, 677, 29 N. W. 778; Hunter v. Hunter, 95 Iowa, 728, 58 Am. St. Rep. 455, 64 N. W. 656; Howard v. Watson, 76 Iowa, 229, 41 N. W. 45; In re

Estate of Proctor, 103 Iowa, 232, 72 N. W. 516; Purdy v. Purdy, 46 N. Y. Supp. 215, 18 App. Div. 310; Hopkins v. Cameron, 70 N. Y. Supp. 1027, 34 Misc. Rep. 688. The will may provide for a remainder over to, or for a division of the estate among, others on the death of the widow: See Sutherland v. Sutherland, 102 Iowa, 535, 63 Am. St. Rep. 477, 71 N. W. 424; Bare v. Bare, 91 Iowa, 143, 59 N. W. 20; Watson v. Watson, 98 Iowa, 132, 67 N. W. 83. "The devise to the plaintiff for life," observes Justice Denio in Lewis v. Smith, 9 N. Y. 502, 61 Am. Dec. 706, "of all the testator's real and personal property, would seem, on a superficial view, to be inconsistent with the right of dower; and it would be clearly so if she was dowable only in the lands of which her husband died seised, after all liens and encumbrances thereon had been satisfied. But as her interest as dowress extends to all the lands of which he was seised during coverture, and it is not subject to his debts nor to any liens which he may have created without her joining in them, it is obvious that such a provision would, in many cases, be quite illusory as a compensation for dower." The rule that a devise to a wife of a life estate in all the testator's property, in the absence of any restrictive words, is not to be treated, as in lieu of dower, is changed by statute in Iowa: Persifield v. Aumick, 116 Iowa, 383, 89 N. W. 1101.

A devise of a portion of the testator's estate to his widow for life, and a devise of the residue to third persons, does not make a case for election between the benefits of the will and the right to dower in such residue: Havens v. Havens, 1 Sand. Ch. (N. Y.) 324; Mills v. Mills, 28 Barb. 454. In Illinois, however, the acceptance by a widow of a devise of a life estate in certain lands bars her dower in lands otherwise devised: Kirkpatrick v. Kirkpatrick, 197 Ill. 144, 64 N. E. 267. It has been held that where certain lands are devised to a widow she cannot be endowed of the said lands: Cunningham v. Shannon, 4 Rich. Eq. (S. C.) 135. Though it seems in Iowa a devise of specific lands does not preclude a claim of dower in them in addition to the life estate: Parker v. Hayden, 84 Iowa, 493, 51 N. W. 248.

Devise During Widowhood.—In case of a devise to a widow for life or during her widowhood, the authorities are conflicting as to whether she may claim dower in the same lands devised. Some authorities hold that there is no inconsistency between the benefits of the will and the estate conferred by law, and she is not forced to elect between them: See Church v. Bull, 2 Denio, 430, 43 Am. Dec. 754; Sanford v. Jackson, 10 Paige, 266. Other authorities announce a contrary doctrine: See Stark v. Hunton, 1 N. J. Eq. 216; Cooper v. Cooper, 56 N. J. Eq. 48, 38 Atl. 198; Hamilton v. Buckwalter, 2

Yeates (Pa.), 389, 1 Am. Dec. 350. In Schwatken v. Daudt, 53 Mo. App. 1, it is held that a devise of all the testator's property to his wife during her widowhood is inconsistent with her claim to dower in the personal property.

Provision for Support of Widow—Annuity and Income.—A gift of one-third of the income of the testator's real estate to his widow for life does not put her to an election between the gift and her dower: Duncklee v. Butler, 56 N. Y. Supp. 329, 25 Misc. Rep. 680; nor does a direction to the executors to apply a certain annual sum from the income of the estate for the support of the widow: Matter of Grotrian, 71 N. Y. Supp. 842, 35 Misc. Rep. 257. A direction to set apart a certain sum out of the estate, the interest thereon to be paid annually to the widow, does not bar her dower, though the will also directs the sale of both real and personal property: Chandler v. Woodward, 3 Harr. (Del.) 428. See, also, Kimbel v. Kimbel, 43 N. Y. Supp. 900, 14 App. Div. 570. A widow is not required to elect between her dower and an annuity which is made a charge on real estate devised to others and is made payable to her for life: Horstmann v. Flege, 172 N. Y. 381, 65 N. E. 202. Compare Worthen v. Pearson, 33 Ga. 385, 81 Am. Dec. 213. Where a will makes no provision for the wife, but the codicil makes the entire estate chargeable for her support during life, she is not forced to elect: Bentley v. Bentley, 112 Iowa, 625, 84 N. W. 676. And if a testator, on devising land to each of his two nephews, provides that one of them shall keep his entire property together and support his widow out of the proceeds, and also give his wife all cash on hand at his death, she is not barred of dower in the land: Hiers v. Gooding, 43 S. C. 428, 21 S. E. 310.

If the provisions of a will demonstrate that it was not the intention of the testator to give both an annuity and dower to his widow, she must elect between them: Dodge v. Dodge, 31 Barb. 413. An annuity, which was made a charge on the entire estate, real and personal, is a bar to dower, where it would defeat the keeping of the entire estate together as directed by the will: Speer v. Speer, 67 Ga. 748; where a testator bequeaths to his wife one room in his dwelling-house and a comfortable maintenance out of his real estate for her during her life or widowhood, and then devises all his real estate to his two sons to be divided equally between them, the bequest to his wife will be regarded as in lieu of dower: White v. White, 1 Harr. (N. J.) 202, 31 Am. Dec. 232. And in Campbell v. Sankey, 111 Iowa, 69, 86 N. W. 48, it is held that a devise of all the property of the testator to his son for the purpose of supporting his widow is inconsistent with her claim of dower. Where, by the terms of a will,

a widow takes about two-thirds of the income of the personal estate and the use of nearly one-half the real estate, this excludes dower: Anthony v. Anthony, 55 Conn. 256, 11 Atl. 45.

Devise to Trustees to Sell.—In Gordon v. Stevens, 2 Hill. Ch. 46, 27 Am. Dec. 445, it is said a devise of lands to trustees to sell is understood to pass the real estate subject to dower. And accordingly it is held in Konvalinka v. Schlegel, 104 N. Y. 125, 58 Am. Rep. 494, 9 N. E. 868, that where a testator willed his residuary estate, consisting of both real and personal property, to his executors to sell and divide the proceeds equally between his wife and children, share and shade alike, the widow takes dower in addition. And a widow is not put to her election where the testator devises all his property to trustees with a peremptory power of sale, and directs the payment to her of an annuity out of the converted fund: Wood v. Wood, 5 Paige, 596, 28 Am. Dec. 451. But see Young v. Boyd, 60 How. Pr. 213; Brink v. Layton, 2 Redf. (N. Y.) 79; Savage v. Burnham, 17 N. Y. 561. However, in Cooper v. Cooper, 56 N. J. Eq. 48, 38 Atl. 198, Vice-Chancellor Pitney says that "some of the older English cases, and perhaps a few in this country, have held a direction to executors to sell and convey real estate did not necessarily indicate that they were to sell free and clear of the dower of the widow. But the modern decisions, which, in my judgment, are more in accordance with common sense, tend to hold that a power and direction to sell necessarily includes the idea of conveying the title free and clear of dower," citing, among other cases, Colgate v. Colgate, 23 N. J. Eq. 372.

Provision for a Division Between Widow and Children.—The decided cases are not harmonious as to whether a wife must elect between her dower and the benefits of the will when her husband devises his estate or the residue thereof to her and her children, share and share alike. Perhaps by the weight of authority she will, in such a case, be put to her election: See Matter of Estate of Gotzian, 34 Minn. 159, 57 Am. Rep. 43, 24 N. W. 920; Helme v. Strater, 52 N. J. Eq. 591, 30 Atl. 333; Bailey v. Boyce, 4 Strob. Eq. (S. C.) 84. Contra, Closs v. Eldert, 51 N. Y. Supp. 881, 30 App. Div. 338. It is held in Hatche's Estate, 62 Vt. 300, 22 Am. St. Rep. 109, 18 Atl. 814, that under a will by which a husband, after making two specific bequests, devises the residue of his estate, real and personal, one-third to his wife, two-ninths to his daughter, and four-ninths to his son, his widow will take both her homestead and dower.

In case of a devise to a wife for life or during widowhood, and at her death or marriage the estate to be equally divided between the testator's heirs, an election to take under the will does not defeat

dower: Sully v. Nebergall, 30 Iowa, 340. And a devise to a widow, to be held and used by her as she may see fit until a certain child becomes of age, then to be equally divided among the children, and, in the event of her marriage before that time, the executor to collect the rents for the children and give her her dower, does not intend the use of the property to be in lieu of dower: Kelly v. Ball, 14 Ky. Law Rep. 132, 19 S. W. 581. But in McLeod v. McDonnel, 6 Ala. 236, a wife is put to her election under a will in these terms: "That all my property, both real and personal, of which I am now possessed, or may hereafter accrue, be retained and continued together till my youngest child may arrive at lawful age; at which time all the above property, with its increase, to be equally divided among all my lawful heirs." She would take a vested interest in one-sixth of the estate, there being five children. And where a testator gives the use of all his property to his wife and children until the youngest attains his majority, at which time the widow is to have one-third and the residue is to be divided among the children, she cannot hold her distributive share under the law and also take under the will: Howard v. Smith, 78 Iowa, 73, 42 N. W. 585. Where a testator makes a specific devise of lands to his widow, and then devises other lands to her in trust for the use of their children, to be divided among them on their majority, she cannot claim dower in the latter real estate: Van Guilder v. Justice, 56 Iowa, 669, 10 N. W. 238.

Other Devises and Bequests.—A provision of a will giving a widow a life use of the homestead does not bar her right to also take her one-third under the law: Richards v. Richards, 90 Iowa, 606, 58 N. W. 926; nor does a provision giving one-half of the rents to her for life, and directing the estate to be divided among the children on her death: Garrett v. Vaughan, 59 S. C. 516, 38 S. E. 166; nor does a devise of a dwelling-house to the widow during life or widowhood, together with a bequest of certain household furniture and other property, the rest of the real property to be divided among the testator's children, who were to aid in her support if she requested it: Jackson v. Churchill, 7 Cow. 287, 17 Am. Dec. 514. A request to a widow that she release her dower in the residuary estate does not put her to an election: Miller v. Miller, 49 N. Y. Supp. 407, 22 Misc. Rep. 582.

On the other hand, it has been held that where a husband devises his whole property, if there is one part thereof with respect to which it is clear that he did not intend it should be subject to dower, it follows that he did not intend any portion to be subject to dower, and his wife is put to her election: Worthen v. Pearson, 33 Ga. 385, 81 Am. Dec. 213. And she is put to her election when he makes

a provision for her, and then disposes of the entire remainder of his estate: Apperson v. Bolton, 29 Ark. 418; or where he gives a power to his executors to rent, lease, repair and insure the real estate, until sold or divided, and out of the rents and profits to pay a provision made for her: Tobias v. Ketchum, 32 N. Y. 319; or where he gives, after the payment of his debts and funeral expenses, to her during her life, the rents, income, interest, use, and occupancy of all his estate, real and personal, on the condition that she keep the buildings and personal property insured, pay all taxes and assessments, and keep the estate in good repair: In the Matter of Zahrt, 94 N. Y. 605; or where he gives her certain personal property in lieu of dower in his personalty, and directs her to sell certain lands and invest the proceeds for the benefit of the children, the gift of personal property is in lieu of dower in the lands directed to be sold: Haszard v. Haszard, 19 R. I. 374, 34 Atl. 150.

Statutory Enactments—Their Effect on the Common-law Doctrine The common-law rule that a devise or bequest in favor of a wife is presumed to be in addition to her dower, unless the contrary appears from the will, and that she is not forced to elect between them, unless the benefits of the will are manifestly inconsistent with the claim of dower, has been reversed by statutes in many of the states; so that a testamentary provision by a husband in favor of his wife is deemed to be in lieu of dower, and puts her to an election between the two, unless it plainly appears from the will that the testator intended she should enjoy both. These statutes usually provide a certain time in which she may signify her dissent from the will and claim her dower, and her failure to renounce the testator's bounty within such time bars her right to dower: Sanders v. Wallace, 118 Ala. 418, 24 South. 354; Stokes v. Pillow, 64 Ark. 1, 40 S. W. 580; Warren v. Warren, 148 Ill. 641, 36 N. E. 611; Wilson v. Moore, 86 Ind. 244; Burkhalter v. Burkhalter, 88 Ind. 368; Miller v. Stephens, 158 Ind. 438, 63 N. E. 847; Huhlien v. Huhlien, 87 Ky. 247, 8 S. W. 260; Bayes v. Howes (Ky.), 6 S. W. 449; Hastings v. Clifford, 32 Me. 132; Dow v. Dow, 36 Me. 211; Collins v. Carman, 5 Md. 503; Reed v. Dickerman, 12 Pick. 145; Adams v. Adams, 5 Met. (Mass.) 277; Stearns v. Perrin (Mich.), 90 N. W. 297; Wall v. Dickens, 66 Miss. 655, 6 South. 515; Kaes v. Gross, 92 Mo. 647, 1 Am. St. Rep. 767, 3 S. W. 840; Chadwick v. Tatem, 9 Mont. 354, 23 Pac. 729; Craven v. Craven, 17 N. C. 338; Griggs v. Veghte, 47 N. J. Eq. 179, 19 Atl. 867; Hill v. Hill, 62 N. J. L. 442, 41 Atl. 943; Corry v. Lamb, 45 Ohio St. 203, 12 N. E. 660; Demoss v. Demoss, 7 Cold. (Tenn.) 256; Application of Wilber, 52 Wis. 295, 9 N. W. 162; Van Steenwyck v. Washburn, 59 Wis. 483, 48 Am. Rep. 532, 17 N. W. 289; Melms v. Pabst Brewing Co., 93 Wis. 140, 66 N. W. 244; Willey v. Lewis, 113 Wis. 618, 88 N. W. 1021.

A devise of land to be enjoyed while the devisee remains the testator's widow is a devise within a statute declaring that a devise to a widow will bar her dower unless renounced: Stone v. Vandermark, 146 Ill. 312, 34 N. E. 150. And a gift of one-third the net income of the testator's lands bars dower: Stunz v. Stunz, 131 Ill. 210, 23 N. E. 407. A condition attached to a devise in trust, that the devisee shall give a bond for the support of the testator's widow during her life, puts her within the Wisconsin statute: Turner v. Scheiber, 89 Wis. 1, 61 N. W. 280. A legacy, in order to bar dower, need not be larger in amount than would the inheritance, in case there were no will: Cribben v. Cribben, 136 Ill. 609, 27 N. E. 70. Of course, if the language of the will clearly shows an intention to give the wife an estate or property in addition to that given by the law, there is no necessity for an election: Like v. Cooper, 132 Ind. 391, 31 N. E. 1118.

Under the Montana statute providing that a devise of land shall bar dower, unless otherwise expressed in the will, such a devise is held a bar to dower in lands conveyed by the husband alone, during coverture: Spalding v. Hershfield, 15 Mont. 253, 39 Pac. 88. But the Missouri statute declares that "if any testator shall, by will, pass any real estate to his wife, such devise shall be in lieu of dower out of the real estate of the husband whereof he died seised," unless the will declares otherwise; and under it, a widow is not put to her election as to lands which the testator had conveyed without his wife joining with him, and of which he did not die seised: Hall v. Smith, 103 Mo. 289, 15 S. W. 621.

If the statute provides, in effect, that where a testator by will devises any land or interest therein to his wife, such devise shall be in lieu of dower in his real estate, unless he otherwise declares in his will, a bequest of personal property does not, like a devise of real estate, compel her to renounce the provisions of the will, or make an election, in order to be endowed of her husband's lands: Jennings v. Smith, 29 Ill. 116; Brown v. Pitney, 39 Ill. 468; Pemberton v. Pemberton, 29 Mo. 408; Martien v. Norris, 91 Mo. 465, 3 S. W. 849.

Conflict of Laws.—A statute providing that a widow shall not be entitled to dower in addition to the provisions of the will, unless such plainly appears to have been the intention of the testator does not apply to lands outside the state: Staigg v. Atkinson, 141 Mass. 561, 12 N. E. 354. But a foreign will devising land within the state is governed by the statute: Jennings v. Jennings, 21 Ohio St. 56. The Virginia statute declaring that a bequest of personal property is to be considered as in lieu of dower, unless the contrary appears in some writing signed by the party making the provision, has no appli-

cation to foreign wills of personalty, which, at the common law, are construed according to the lex domicilii; so that where a person domiciled in New York bequeaths personalty to his wife, but makes no disposition of real property in Virginia, and the will contains nothing incompatible with the claim of dower, the will is construed by the common-law doctrine of New York, to the effect that a testamentary gift will not be regarded as in lieu of dower, unless the testator's intent to the contrary appears from express words, or by necessary implication: Bolling v. Bolling, 88 Va. 524, 14 S. E. 67.

Community Property.—The common-law rule governing the doctrine of election between the right of dower, and the benefits of the will, has been adopted by the courts in dealing with the question of election where a widow's right in community property is in issue. Accordingly, if a husband undertakes to dispose by will of the entire community property, and his widow chooses to accept a testamentary provision in her favor, she thereby becomes devested of her interest in the common property, provided the assertion of the community right would necessarily defeat the objects of the will. But, in order to put her to her election between the provision of the will and her right in the community property, the provision must be expressly declared to be in lieu of her interest in such property, or else an intention on the part of the testator that his bounty should be in lieu of such interest must be deduced by clear and manifest implication from the terms of the will, based upon the fact that her claim to her share in the community would be inconsistent with the will, or repugnant to its provisions so as to disturb or defeat them.

When there is no such express declaration, or no such clear and manifest intent, she may take what the law allows her, and also what the will gives her: Morrison v. Bowman, 29 Cal. 337; Estate of Silvey, 42 Cal. 210; King v. Lagrange, 50 Cal. 328; Estate of Frey, 52 Cal. 658; In re Stewart, 74 Cal. 98, 15 Pac. 445; In re Gilmore, 81 Cal. 240, 22 Pac. 655; In re Smith's Estate (Cal.), 38 Pac. 950; Theall v. Theall, 7 La. 226, 26 Am. Dec. 501; Pratt v. Douglas, 38 N. J. Eq. 516; Crosson v. Dyer, 9 Tex. Civ. App. 482, 30 S. W. 929; Smith v. Butler, 85 Tex. 126, 19 S. W. 1083; Gibony v. Hutcheson, 20 Tex. Civ. App. 581, 50 S. W. 648; McClary v. Duckworth (Tex. Civ. App.), 57 S. W. 317; Gilroy v. Richards (Tex. Civ. App.), 63 S. W. 664; Skagg v. Deskin (Tex. Civ. App.), 66 S. W. 793.

In the Matter of FRANK H. WOODS TRUST.

[No. 3229 (N. S.); (Old No. 23,482); February, 1915].

Trusts—Accounts of Trustee—Conclusiveness and Finality of Allowance.—A ruling by the court on a testamentary trustee's accounts, clearly contrary to the terms of the trust as defined in the final decree of distribution, and the result of a judicial inadvertence based upon the fact that at the time of the settlement of the accounts there was no controversy as to the items thereof, though final as to the contents of those accounts, is not binding upon the court in relation to subsequent accounts of the trustee. While such accounts, unchallenged at the time, are unaffected after the term for appeal therefrom has passed, yet finality as to their adjudication may not be predicated with reference to their effect upon the future. Such settlements affected only the items contained in the accounts for the period.

Trusts—Separate Accountings of Trustees—Relation One to Another.—A judgment in one proceeding cannot control judicial action, the judgment, in another and independent action or proceeding; and every separate accounting of a trustee is an independent proceeding, distinct from every other accounting, past or future.

Trusts—Agreement Affecting Income Rights of Beneficiary—Power to Make.—An agreement between the trustees of a testamentary trust and the income beneficiary, whereby the interests of the latter are to be preserved by withholding certain properties from sale at a sacrifice, and the income rights of the beneficiary increased beyond what is contemplated by the instrument creating the trust, cannot be justified on account of the unusual conditions which followed the great fire in San Francisco and which prevailed when the agreement was made, nor does it become binding upon the court because the court may seem to have accepted it in the settlement of uncontested accounts presented by the trustees.

Trusts—Net Income—What Constitutes.—Net income is "the income derived from the whole property, less the necessary expenses incurred in its management, and disbursements incurred on account thereof." It is simply "net," not "gross," income, and that is what the income beneficiary in the case at bar derived through the testamentary trust; and no former adjustment, even if not now reviewable, as to the previous accounts, although they were left to the court by the mutual consent of the then trustees of the trust and the income beneficiary, can relieve the court in the present instance of the duty of meeting the issue, for the first time presented in a seriously contested form.

Trusts—Life Estate—Taxes—From What Property Payable.—In the case under consideration the taxes upon the unimproved property which produces no income should be paid out of the corpus of the estate; but the ordinary taxes of property in which there is a life estate, and the ordinary expenses of the care and management of the principal, are charges upon the life estate, to be paid out of the income.

Trusts—Life Estate—Duty to Pay Insurance—Deduction from Income.—A life tenant is not bound to insure the interest of the remainderman, but each may insure his own interest. A trustee who holds the legal title for both has the duty of insuring; and accordingly insurance premiums paid by a trustee would probably be universally treated as an ordinary expense of holding and managing the property, and so payable out of income.

Trusts—Administrative Expenses—Payment from Current Income. The administrative expenses of a trust, namely, court and legal costs and expenses, office expenses and office administration and salaries, and trustees' compensation, should come out of current income.

Trusts—Compensation of Trustee—Payment from Income.—A trustee is entitled to a reasonable compensation for his services as they are rendered, and unless a contrary intention appears, the compensation must come out of the income of the fund in the administration of which it is earned.

Trusts—Interest on Trust Indebtedness—How Chargeable.—The question in this case as to the payment of the interest on the trust indebtedness, which it is proposed to charge against capital entirely, is not correctly so chargeable, for the equitable tenant for life must pay the interest upon all encumbrances upon the estate, to the extent of the rents and profits.

Trusts—Interest on Encumbrances—Payment by Life Tenant.—Interest on encumbrances on trust property, for example, a mortgage, must be paid by the life tenant although it would not be safe for a remainderman as against the mortgagee to rely on the liability of the life tenant to pay the interest.

Trusts—Interest on Encumbrances—Payment from Income.—A trustee who places encumbrance on property, or allows one to remain, should pay the interest out of the income.

Trusts—Encumbrance on Property—Payment from Principal of Trust Fund.—If the trustee pays off the principal of the encumbrance, he should pay it out of the principal of the trust fund of which both the life tenant and remainderman are beneficiaries.

Trusts—Encumbrance on Property—Effect of Payment by Remainderman.—If a remainderman pays off the encumbrance, the life tenant must continue to pay interest to the remainderman, or what is more usual, must pay to the remainderman the present worth of an annuity equal to the annual interest running during the number of years which constitutes the expectancy of life of the tenant for life.

Application for settlement of eighth, ninth, tenth, and eleventh accounts of trustees.

Harry F. Woods, Timothy J. Lyons and H. A. Hedger, trustees.

Timothy J. Lyons, for Trustees Woods and Lyons.

Edward C. Harrison, for H. A. Hedger, Trustee.

COFFEY, J. The accounting in this case embraces four trust years, July 1, 1908, to June 30, 1912, inclusive, and is presented by the trustees under section 1699, Code of Civil Procedure.

The trust was established and adjudicated by a decree of final distribution, dated June 14, 1901 (filed June 21, 1901) in this court, Department 9, in the proceeding 23,482, probate, entitled, "In the Matter of the Estate of Francis Henry Woods, also known as and called Frank H. Woods and Francis H. Woods, and F. H. Woods, Deceased." No appeal was ever taken, nor any attempt at an appeal from this decree, and it therefore became final, and it was consented to by Harry F. Woods, who was and is the sole heir at law of said decedent and testator, and the only person who could have objected to said decree to which he expressly consented, as is recited by the court therein. In and by that decree all the residue of the estate of the decedent testator, after payment of said legacies, was distributed to Harry F. Woods, Edward Barry, Timothy J. Lyons and C. G. Minifie, and their successors in the trust, as trustees upon the trust, and for the uses and purposes set forth in said decree. That immediately upon

the entry of said decree the property distributed thereunder to the said four trustees was delivered to and taken possession of by them as such trustees, and pursuant to and in acceptance of the trusts declared by said decree, whereupon the said trustees entered upon and in the performance and discharge of their duties as such trustees and the administration of said trust, and continued therein until the resignation of the said C. G. Minifie as one of said trustees and the appointment (by order dated October 21, 1904) in his place of S. B. Cushing, by this court in the above proceeding (the first of the three "successors or alternates" in trust, as adjudicated in the aforesaid decree of final distribution) following which appointment and the qualification of said Cushing as a trustee, the administration of said trust was carried on and performed by said Harry F. Woods, Edward Barry, Timothy J. Lyons, and S. B. Cushing, as trustees of said trust, until the death of the trustee Edward Barry on September 23, 1909 (except that from the date May 17, 1909, the three trustees, Harry F. Woods, and Edward Barry and Timothy J. Lyons alone acted as trustees, under order of this court of said date, May 17, 1909, the trustee, S. B. Cushing, being unable to act, by reason of sickness). That one week subsequent to the death of said Edward Barry, the trustee S. B. Cushing died, to wit, on September 30, 1909. That thereafter, the remaining trustees, Harry F. Woods and Timothy J. Lyons, presented to this court their petition in the above-entitled proceeding (dated October 5, 1909, and filed herein October 6, 1909), praying for the induction of the second "successor or alternate" in the trust, as named and adjudged in the aforesaid decree of final distribution, namely H. A. Hedger, and further praying that the court further adjudge the membership of the trust, and setting forth and alleging in that behalf that the third "successor or alternate" in the trust, as named and adjudged in said decree of final distribution (following the will of the trustor), namely, George F. Bowman, had "died in the lifetime of the trustor Frank H. Woods," and that "the membership of the trustees of said Frank H. Woods

Trust consisted of three persons only, namely, Harry F. Woods, Timothy J. Lyons and H. A. Hedger''; annexed to which petition the said H. A. Hedger certified to the court in writing his ''willingness, consent and desire to act as one of the trustees of the aforesaid Frank H. Woods Trust, pursuant to my right and title set forth in the foregoing petition.'' Thereafter, due proceedings being had, the said H. A. Hedger was inducted into the office of trustee in pursuance of said petition, and has ever since acted as such in association with the surviving original trustees, Harry F. Woods and Timothy J. Lyons; and these three now constitute the trustees of the trust created by the will of the decedent trustor, which trust, as adjudicated by the decree of final distribution in clause sixth is as follows: That as to all the rest and residue of the property and estate of the aforesaid decedent and testator, Francis Henry Woods (also known as and called Frank H. Woods and Francis H. Woods, and F. H. Woods), which rest and residue are hereinafter particularly described, and also any and all other property, estate, rights and claims of said decedent and testator, if any such there be, not now known or discovered, the same and every part thereof, are hereby distributed, in accordance with the last will, and codicils thereto, of said decedent and testator, unto Harry F. Woods and Edward Barry, and Charles G. Minifie and Timothy J. Lyons, as trustees (and their successors or alternates in the trust), in trust, however, upon and for the following uses and purposes, that is to say:

(A) To receive the rents and profits of the real property, and to receive the rents, issues, profits and income of said real property and of the personal property; and also, as hereinafter provided, to accumulate the rents, issues, profits and income of both the real and personal property; and also, to pay to or apply to the use of Harry F. Woods, out of the principal or capital of the personal property, such amount or amounts as hereinafter provided.

(B) To pay to or apply to the use of Harry F. Woods, aforesaid, the son of testator, for and during the term of his

natural life, monthly and at other periods, the entire net amount of the rents, issues, profits and income of said real and personal property, and of, to wit, the trust properties and estate as they may exist at any and all times during his natural life; and also with respect to the personal property hereinafter described (including any and all changes thereof, by investment, reinvestment, exchange or otherwise) to pay to or apply to the use of said Harry F. Woods, such amount or amounts from or out of the principal or capital thereof, as the trustees of the trust may determine, at any time, to be necessary for any special purpose personal to said Harry F. Woods; their determination as to such necessity at any time to be in the unrestricted and absolute discretion of said trustees. Said trust to be subject to the payment of $50 per month to Mrs. H. E. Robinson, during widowhood aforesaid.

(C) Upon and after the death of the said Harry F. Woods, should he leave a wife and lawfully begotten issue surviving him, or should he leave lawfully begotten issue surviving him, to pay or apply out of the net income of the trust properties and estate then remaining (and after allowing for and deducting the expenses of the trust, and trust properties, and trust management, including such amount as in their discretion they may deem a reasonable reserve fund for ordinary or anticipated expenses of preserving and protecting the trust properties, as follows, to wit:

First—To pay from month to month to the surviving wife of said Harry F. Woods (or in the discretion of the trustees to apply to her use or order), while she remains the widow of said Harry F. Woods, and not otherwise, the sum of one hundred and fifty dollars ($150); provided, that if the net income for any particular month or months (after allowances and deductions, as aforesaid) is insufficient to pay said sum of $150, then to pay to her or apply to her use or order the whole of such net income for such deficiency month or months.

Second—Upon the remarriage of said surviving wife of Harry F. Woods, or if she shall die not having remarried, then upon her death, all her rights aforesaid, and all her

rights under this trust, shall ipso facto cease; and thereupon (and previously, if in their absolute discretion, they shall see fit), or should the said Harry F. Woods die without a wife surviving him, but leaving lawfully begotten issue, the trustees of this trust shall, from and out of the net income (after the allowances and deductions aforesaid) pay to or apply to the use of the lawfully begotten issue of said Harry F. Woods who survived him, or to those of such issue then surviving, and the lawfully begotten issue of any of such issue who may die subsequent to said Harry F. Woods, such sum, from month to month (or other convenient or advisable period), as may be necessary or proper for their respective care, maintenance and education, taking into consideration their station in life and the value of the trust estate, and to be for their respective personal and exclusive use and benefit, until such period of time as the youngest of the issue of said Harry F. Woods who survived him, who attains the age of twenty-six years, shall attain such age of twenty-six years (the intention hereby being, for example, that if said Harry F. Woods should leave surviving him three issue, and one of them should die before attaining the age of twenty-six years, then until the younger of the other two issue shall attain the age of twenty-six years, and if two of said three issue should die before attaining the age of twenty-six years, then until the third of such issue shall attain the age of twenty-six years; and if said Harry F. Woods should leave more than three issue surviving him, a like construction as given for the supposed case of three issue surviving).

Third—To accumulate all income undisposed of for the benefit of the surviving issue of said Harry F. Woods, and to wit, those issue of said Harry F. Woods, who survive and are entitled to take upon and after the termination of this trust, according to their respective rights and shares; and such accumulation to continue until the termination of this trust.

Fourth—This trust (meaning the trust in the event of said Harry F. Woods dying and leaving issue, or a wife and issue

surviving him) shall terminate and expire when the youngest of the issue of said Harry F. Woods who survived him, who attains the age of twenty-six years, shall attain such age of twenty-six years (following the construction hereinabove given by way of illustration, under subdivision "2nd" of division (C) of the trust adjudged as in the trustees, distributees in trust.

Fifth—Said trust to be subject to the payment of $50 per month to Mrs. H. E. Robinson, during widowhood aforesaid.

As to this last clause it was determined by the said decree as follows: "That as to the annuity aforesaid, provided in testator's will to be paid to Mrs. H. E. Robinson, to wit: Fifty ($50.00) dollars per month during her widowhood, the same and the payment thereof are a first charge upon and against the net income derivable from the aforesaid trust." (See pages 13 and 14, Decree of Distribution.)

This finding and decree eliminates from further consideration the items as to this annuity, as clearly chargeable upon the net income. It appears, however, that some portion of this annuity was paid by the trustees out of the capital, and the explanation of this partial payment is made on pages 154 and 155:

"The calculation in the present accounting, for each of its four Trust Years, as to what is the apparent Net Income of this Trust, namely the rights of the Income Beneficiary, is in exact accordance with the method of calculation, and provisional determination by the Trustees, pursued and presented in all previous Accountings herein, following the First Annual Account, and the aforesaid settlement of said First Account. This will be apparent by reference to the Schedule, page 143, of the annexed Accounting, where every classification of charges and expenses of the Trust Properties, and of the administrative expenses of the Trust is clearly stated and separated, and the amount and proportion thereof which is charged, assessed or apportioned as to Income Rights. As will be seen by reference to said Schedule the charges against Income rights there made follow the ruling of this Court made

on the settlement of the First Annual Account, hereinabove stated with particularity as between "Income" and "Capital" rights (pp. 152–153, above). There is one exception to the statement last made, and that exception has been already noted and particularly referred to and discussed, namely, the annuity to Mrs. Robinson of $50.00 per month. The rights of said annuitant for the entire period, beginning with the date of said disaster, April 18, 1906, to the terminating date of the present Accounting, six years, 2½ months, have been wholly paid during the four Trust Years of this Accounting. The total of the payments to said annuitant aggregates $3375.00; and the explanation of their elimination by the Trust bookkeeper as a charge against the Income Rights lies in the fact that the first payment of $600.00 to said annuitant which appears in this Accounting was so paid her pursuant to the instructions and order of this Court on the settlement of the last Accounting herein, the Seventh Annual Account, and that the Court in directing the Trustees to make said payment of $600.00 ruled that it should be charged against 'Capital' rights in view of the nonexistence at that time, and from April 18, 1906, of 'normal conditions' in the Trust and Trust Estate. The Trust bookkeeper in the Schedules to the present Accounting where apparent Net Income is arrived at for each of the four Trust Years has assumed that the ruling of the Court on the direction to make said first payment of $600.00 and the reasons for such ruling are extended to all the other payments to said annuitant, during the period of this Accounting, which aggregate with said $600.00 payment the sum of $3375.00. Whether or not the ruling should be so applied and extended is a matter for determination by this Court on the hearing and settlement of the present Accounting. This question, and the facts as to such payments, have been already noted hereinabove in another connection, to which reference is now made (pp. 128–129, in note there, and pp. 34–35, above). The Trustee, H. A. Hedger, claims the amount of said $3375.00 should be charged against 'Income' rights."

Trustee Hedger is right in this regard. The ruling of the court in view of the decree of final distribution, was clearly contrary to the terms of the trust as defined in said decree, and was a judicial inadvertence based upon the fact that at the time of the settlement of said account there was no controversy as to the items thereof; and, while it is final as to that account, it is not now binding upon the court. It was erroneous, but, having been acquiesced in by the parties to the settlement, it is not now a subject of review, except for the purpose of correction in the account now before the court. It may be said, in this connection, that while such accounts unchallenged at the time are unaffected after the term for appeal therefrom has passed, yet finality as to the adjudication of such former accounts may not be predicated with reference to their effect upon the future. Such settlements affected only the items contained in the accounts for the period. The accounts were unopposed, agreed to by all concerned, and the court had a right, if it was not its duty, to assume their accuracy and rely upon the good faith of the attorney, himself a trustee, under whose direction the accounts were prepared, and who framed the decree and procured the signature of the judge thereto. No finality attached to this act, except as to the contents of the particular account, for it is a settled rule of law, as Mr. Lyons says on page 36 of his oral argument, that a judgment in one proceeding cannot control judicial action—the judgment—in another and independent action or proceeding; and manifestly every separate accounting is an independent proceeding, distinct from every other accounting, past or future (Estate Marshall, 118 Cal. 381, 50 Pac. 540, McFarland, J.; Estate Grant, 131 Cal. 429, 63 Pac. 731); but, even if this were not so, the attorney inserted industriously a provision to this effect, in several accounts:

"That neither the findings hereinabove nor this decree should or shall be considered or deemed or taken as binding

or conclusive, either by way of a precedent in the trust or as res judicata, as to any items, charges, allowances, claims or rights in any future accounting by the trustees of said trust, which may be the same or similar, as to subject matter, or as involving, or apparently involving, the same or similar or analogous questions or considerations, whether of fact or law, as the items, charges, allowances, claims or rights (or any of them) referred to, found, or determined, by the hereinabove findings of this decree; excepting only the finding and determination as to the trust properties in the possession or under the control of said trustee on June 30, 1904; provided, nevertheless, that this decree is intended to be and shall be taken as definite and conclusive as to the period of the aforesaid present accounting, and the administration of said Frank H. Woods Trust during said period."

Even if this provision were not inserted in the decree the law would have read it in, for the supreme court has so decided; and that point is not here contested by the third trustee, for he asserts no right to question any expenditure, or any act, that has been already approved by the court; but he claims to be entirely within his rights to refuse to accede to any item or act of the other trustees, so far as these accounts are concerned, that he deems to be prejudicial to any beneficiary of the trust, and he does not consider as a sufficient reason why he should do so the fact that similar accounts may have passed the court on a former settlement when no opposition was made and no controversy had, in the matter now before the court, which should be free from any complication or confusion by reason of former adjudications which applied solely to the matters then cognizable by the court. The items to which he particularly objects as proposed to be charged against the capital which he thinks would be improperly so charged are as follows:

Taxes	$81.48
Interest on trust indebtedness	30,927.62
Annuity to Mrs. Robinson	3,375.00
Strohm settlement	760.00
Masonic Cemetery Association	36.00
Two-thirds of insurance premiums	4,563.07
Expenses of annual report	28.25
One-half of expenses of administration	9,375.63
Amounting to a total of	$49,147.05

The third trustee insists that so far as this court has upon any of its previous settlements ruled approving the charge of any of these different items, it has done so without the presentation of any controversy upon the subject, and, as before stated, upon the express reservation that the question should not be thereby foreclosed against discussion upon any subsequent settlement.

Mr. Lyons, in his oral argument, admits that it is true that this provision that the court should not be bound in any future accounting by its decision upon the particular account then settled; but, he says, that such a provision is merely ex industria, and indicates no more than a not uncommon superfluity having its origin in overabundant caution; for taking the provision as a whole, it merely states an established principle of law, as hereinabove recited; and he imputes argumentatively another possible intention to this provision.

In order to make clear this phase of Mr. Lyons' argument, it is here transcribed from pages 36, 37, and part of 38:

"And yet this ex industria provision may have also intended to indicate—and in all probability it did so intend—that future accountings might disclose facts and circumstances as to disbursements made, or expenses or obligations incurred, which the court might or might not conclude as falling within any of the classifications of disbursements and expenses theretofore made on the previous accountings; or that a different condition of the trust affairs, and trust assets,

as a whole, or otherwise, might present itself. Such a situation as the one last suggested came to pass as the result of the disaster in San Francisco of April 18–21, 1906; and that situation, in its general aspect, has continued throughout the six trust years following the disaster which marks the terminating date of this accounting, June 30, 1912, as the majority report fully shows.

"But irrespective of the effect of this ex industria provision—and its effect and purpose, it is believed, are as above stated—this cannot alter or diminish the fact, or the logical effect of the fact, that on five separate adjudications this court, and the same judge in each instance, determined with precision and by specific illustration the method by which the amount of 'Net Income' for each trust year should be arrived at (for 'normal conditions'); and on each of these five adjudications the expressed method, and its various elements, were the same. Indeed, there are seven instead of five separate adjudications in support of the method for determining 'Net Income' under 'normal conditions'; for the action of the court on the settlement of the sixth and seventh annual accounts, in its 'adjustment' of net income for the two trust years immediately following the disaster, did so on the ground, apart from the special agreement with the beneficiary (or as a part of the 'equities' involved in the agreement), that 'normal conditions' ceased upon the disaster of April 18–21, 1906, and continued nonexistent, thus recognizing, and necessarily affirming, its rule laid down in its five separate adjudications, up to the time of the disaster, as the proper and settled one in the case of 'normal conditions.'

"It appears clear, therefore, that this court has decisively established how 'Net Income' should be determined under 'normal conditions,' and that Trustee Hedger's efforts to have this settled rule set aside and disregarded at this late date is a futile attempt, and nothing less than an impeachment of the court's solemn judgment on seven different occasions. As a matter of fact, however, the rule for determining 'Net Income' under 'normal conditions,' does not arise on this

accounting, as already noted, for two reasons: First, the absence of 'normal conditions'; and, second, the special agreement with the income beneficiary—the same two conditions which formed the basis of the court's adjustment on the last preceding accounting herein. But, in view of the attack by Trustee Hedger, on the established rulings of the court as to net income under 'normal conditions' we have thought it proper to set forth the facts and considerations above stated, and those to be presently noted. In the determination of how 'Net Income' should be arrived at under 'normal conditions,' the court in its numerous and uniform adjudications was called upon to adjudge how the various items of disbursements and expenses as to the trust properties and the administration of the trust, should be assessed—whether to 'Income' or 'Capital,' or in part as to each. It determined this matter with great precision, based on the character and nature, of each item, as reflected by its benefit to capital or income, or to both; and taking into consideration, as to some of the items, the objects and purposes of the Trust, and the rights of the persons interested—'Capital' and 'Income' rights—and the duties of the trustees as representing all those rights; their duty to protect all such rights, and to administer the trust conformably to that duty. Accordingly the court assessed certain classes of disbursements and expenses against 'Income,' wholly, and apportioned certain other classes between 'Income' and 'Capital,' each to bear a specified proportion determinable by the legal character of the expense. Most of the usual charges and expenses were assessed wholly against 'Income,' and the remainder apportioned—in one class of cases two-thirds to 'Capital' and one-third to 'Income' ('permanent improvements' to realties, but not 'repairs'; and insurance premiums as to improved realties), and in the other class one-half to 'Income' and one-half to 'Capital' (all administrative expense of the Trust)."

As to the special agreement alluded to in the foregoing extract, and also referred to in the same argument on page 4, as a "solemn contract" between the then trustees and the

income beneficiary, as approved by this court in the settlement of the fifth, sixth, and seventh annual accounts of the trustees of this trust I have failed to find in the record any authenticated executed instrument constituting a solemn contract; but, there is what purports to be a quotation therefrom on pages 10 and 11 of the argument, copied from pages 30 and 31 of the Report to the Seventh Annual Account, as follows:

"That by reason of the disaster on said April 18, 1906, and the fact that all the improvements on the real properties were wholly destroyed, and the income on some of the personal property discontinued, more than three-fourths of the gross income of the trust was swept away, the rents from the real properties alone representing nearly three-fourths of the entire gross income of the trust, being a sum of $47,000 annually, at the time of said disaster, out of a total gross income of between $63,000 and $64.000.

"In these circumstances and to save the capital of the trust, and the interests of the 'Capital' from great losses which must ensue if sales of the realty or personalty had been insisted upon by the income beneficiary, the special arrangement and agreement set forth in said two last accountings (and reports therewith) were made with said income beneficiary.

"Under this arrangement and agreement the trustees were and are enabled to hold said properties until such time (if possible) as normal conditions in San Francisco might come about and a fair price be obtained for such properties as might ultimately have been sold or be selected as advisable to sell; in the meantime raising money to finance the trust affairs and carry out such building operations and other rehabilitation of the trust assets as might be deemed advisable and found possible of accomplishment.

"Such agreement with the income beneficiary involved the obligation of the trust and the stipulation of the trustees that said beneficiary's income rights in the properties so held should be deemed preserved and protected, the amount of

such income rights from time to time—annually or otherwise—to be fixed or adjusted between the trustees and the beneficiary, or by or with the advice of this honorable court.

"By similar agreement with the income beneficiary entered into long before the disaster of April 18, 1906, the capital of the trust benefited in a very large amount as to a valuable item of personal property which had become nonincome producing and continued to remain such for more than twenty-nine months; and at the same time the rights of the income beneficiary to his lost income were restored to him upon the ultimate transaction which resulted in such an important benefit to the interests of the capital.

"Under the arrangement aforesaid with the income beneficiary as to properties held since April 18, 1906, the effect has been, up to this time, to deprive the income beneficiary, for the time being, of a tremendous amount of income, leaving the actual income—especially the net income—to be of such comparatively small amount as to be inadequate for the wants of said beneficiary and his family, considering their station in life and the obligations and requirements thereof. It has become apparent at this date that some different arrangement will have to be made in justice to the income beneficiary, as to adjustment of net income on the settlement of the annual accountings herein."

Mr. Lyons says, in his argument, "as will be noted in the quotation just made, the agreement of the trustees of this trust with the income beneficiary, Mr. Woods (approved and acted upon by this court, as already noted), is clear in its terms, and specific as to its intent as regards the income beneficiary. It involved the obligation of the trust and the stipulation of the trustees that said beneficiary's income rights in the properties so held should be deemed preserved and protected, the amount of such income rights from time to time—annually or otherwise—to be fixed or adjusted between the trustees and the beneficiary, or by or with the advice of this honorable court."

"In the settlement of the aforesaid seventh annual account, adopting the suggestions of the trustees, of the typed report to that account, they leaving the adjustment to the court upon the suggestions therein made, this court basing its action upon said agreement, the income beneficiary consenting, fixed and adjusted the net income, or income rights, of the beneficiary, for the two trust years following the great fire of April 18–21, 1906, namely the period comprising July 1, 1906, to June 30, 1908, inclusive, at $32,850 per annum. The present four years' accounting begins with the terminating date of the two trust years so adjusted on said seventh annual account."

It is clear, therefore, argues this counsel, that the previous court adjustment of $32,850 per annum, would be prima facie, applicable as a proper "adjustment" of income rights for the four trust years of the present accounting. Indeed, the amount of the former "adjustment" might properly be increased to a considerable sum in excess of $32,850 per annum, if the equities of the "facts and circumstances" of the four years of the present accounting are considered in any "adjustment," as they must be if the agreement be insisted upon by the income beneficiary—for any "adjustment" must be predicated upon the "equities" apparent during any trust year or trust years, as in no other way may the rights of the income beneficiary, in view of his agreement with the trustees, be arrived at; and it may be noted that, under the terms of the agreement the adjustment could be had directly between the "trustees" and the "income beneficiary," but, as also provided by the agreement it might be left to the court itself, viz., "to be fixed or adjusted between the trustees and the beneficiary, or by or with the advice of the court."

The "adjustment" was left to the court on the previous accounting, by mutual consent of the (then) four trustees of the trust, and the beneficiary; as it is now likewise left, as to the present accounting, by the majority trustees and the beneficiary (there being now but three trustees, the third and minority trustee having become a trustee since said previous accounting).

The "equities" disclosed by the present accounting, for determination or "adjustment" of income rights, as per said agreement, are set forth in the typed "Report" of the majority trustees, not merely specifically as to the facts and circumstances of the trust affairs during the four years' period of this accounting, and before that, covering the period beginning with execution of the agreement—immediately following the disaster of April 18–21, 1906—but with the greatest elaboration as to those facts and circumstances.

The burden of this argument rests upon the validity, tenor, force and effect of the special agreement which the majority trustees claim has at all times to this date been in force and acted upon and is conclusive upon this court, according to its repeated rulings, in former accounts. Trustee Hedger says that this agreement so called is at best vague in its terms and, therefore, not legally or equitably enforceable for any precise or fixed quantity, figure or percentage, and, quoting from Trustee Hedger, on pages 195 and 196 of the typewritten report to the present accounting, assuming that the agreement, as made, was within the powers of the trustees and properly made by them in the best interest of the trust, nevertheless the income beneficiary has, before this, received full and complete compensation for everything due him under the agreement pursuant to its spirit.

In this regard it must be borne in mind that the disaster of 1906 destroyed a large portion of the capital of the property; and although this portion of the capital destroyed was all of the income-producing part of the real property, and a greater loss therefore to income than to capital, it was nevertheless at the same time a reduction of the capital to the extent of the property destroyed, and it resulted also in a change of conditions to which no measure of antedisaster conditions could be applied. In the then unusual condition of affairs, the income beneficiary was entitled, as a matter of course, to call upon the trustees to sell or mortgage some part of the trust property for the purpose of improving other parts, or investing the proceeds in income-producing property; but

these rights on the part of the income beneficiary were not absolute to the extent of requiring an immediate sacrifice of any of the capital; and if they had been, it would have resulted in further loss to the income interests as well as further loss to the capital interests; and refraining from sale at a time when a sale could not have been made without a sacrifice (assuming this to have been the case), was therefore not only something which it was the trustees' duty to do, having regard to the interests of income and capital alike, but which the income beneficiary would necessarily have approved, if only as a measure in his own interest. Taking compensation, therefore, from the capital interests, for his consent to an act, which act was the duty of the trustees without reference to his consent, is asking something from the capital for which it has not received any consideration from him. If the contrary view be considered the correct one, then we have only to reflect for a moment to see that, if the agreement had not been made, and the beneficiary had insisted upon an immediate sale of a portion of the real property and the devotion of its proceeds to the improvement of the remainder, he would not have received any income whatever until that improvement had been accomplished, and his income then would have been on a very materially diminished quantity of capital. Either this is so, or the benefit claimed to have been gained by the capital has not resulted from his agreement.

Mr. Lyons says, on pages 33, 34 and 35 of his oral argument that the answer to this suggestion of vagueness in the terms of the agreement is obvious and conclusive.

It is found, first, in the plain terms of the agreement, already quoted, apart from its object, intent and purpose, which give its clear interpretation if there were any vagueness in its terms; and, second, in the action of this court in the settlement of the seventh annual account, which forecloses any suggestion of vagueness in its terms or any misunderstanding as to its object, intent and purpose.

The answer to the other suggestion for disregarding the agreement is equally obvious and conclusive. What the income beneficiary has received "before this," "under the agreement," was received under the court's settlement of said seventh annual account. That settlement only related to the period to which it referred, the two trust years July 1, 1906, to June 30, 1908, inclusive, immediately following the disaster. It could not relate, and did not, of course, purport to relate, to any subsequent period, as any such subsequent period was not and could not have been before the court on the settlement of the seventh annual account.

The agreement has remained in force during the entire period of the four trust years of the present accounting, and the holding, handling and administration of the trust properties during those four trust years have been in accordance with and in enforcement of the rights of the trustees stipulated by the income beneficiary under that special agreement with him. All this has been attempted to be brought to the attention of the court by what has been stated hereinabove; and the truth of it has been fully set forth, explained, and illustrated in the majority report of the trustees, and the elaborate statement of facts and circumstances in that connection. No denial of the statements in the last two sentences may be justly made by anyone—trustee, beneficiary, or other; and if there be anything in the report of the minority trustee which may be construed as a denial it is not in conformity with the verities of the matter.

Therefore, if it was proper by this court on the settlement of the seventh annual account of the trustees—the last preceding accounting—to accept and adopt the said special agreement with the income beneficiary, as the basis for the determination and "adjustment" of his income rights, it is equally proper for the period of this accounting to make a determination and an "adjustment" of the rights of the income beneficiary on the same basis of that special agreement.

It is proper to note here that the necessity for action by the court on this special agreement will cease on the present accounting; for it is stated in the majority report to this accounting that "normal conditions" have apparently been reached, as to the real assets, at the terminating date of the present accounting, June 30, 1912.

Trustee Hedger, as already indicated, also opposes the correctness of the presentation of income rights apart from said special agreement. This is the presentation made in the account itself—the schedules to the account, pp. 142, 143—already noted as made in accordance with the uniform rulings of this court, beginning with the decree of settlement of the first annual account up to the time of the said disaster, the settlement of the fifth annual account (following which the said special agreement became operative). His opposition in this regard, is as unfounded, it is respectfully submitted, as is his attempt to have the court disregard the said special agreement with the income beneficiary. The desire, or at least the contention, of Trustee Hedger, is that the solemn adjudications of this court, beginning with the settlement of the first annual account and reaffirmed in the settlement of the four succeeding annual accounts—following which the "Special Agreement" intervened and "normal conditions" were suspended—should be now disregarded and set aside, so far as those five separate adjudications determined the method for determining "net income."

It is submitted that Trustee Hedger's attempt just stated should be judicially considered as exceeding any just expectation of successful accomplishment. The five separate adjudications of the court referred to—which, of course only concerned "normal conditions"—should be sufficient as establishing a rule in this trust for the determination of "net income" under "normal conditions"; especially when the matter is presented to the same judge who has considered and decided every question arising in the trust affairs during the eleven years' existence and administration of the trust. These five separate adjudications must certainly be considered

as laying down a settled rule for "normal conditions," as to the method of arriving at "net income," where the character of items involved in that question is the same as those passed upon in each of those five adjudications, namely, the classification of items specifically defined and distinguished by the court, and hereinabove set forth.

The court has been liberal in making quotations from the two reports and from the oral argument in support of the report of the majority trustees in order to present fully, and at the same time as concisely as possible, the essential elements of the differences which the court is requird to dispose of in connection with the settlement of the present account, these differences comprising the effect of the agreement or arrangement, between the trustees on the former accountings and the income beneficiary; and the apportionment of certain expenses as between capital and income. The views of the majority trustees have been set forth, as their counsel says, with the greatest elaboration as to all the facts and circumstances. Indeed, it is difficult to imagine any presentation more elaborate and analytical than the statement of the report of the majority trustees and the oral argument in support thereof, which deserve the commendation in the letter to Mr. Lyons from the income beneficiary and cotrustee, in which after stating shortly his view of his rights and his sacrifices on behalf of the capital, he says (p. 220, Report):

"I have not figured up all the benefits to the capital, but if you should make your report to this account in the same elaborate and analytical manner as you have done in preparing the reports to all previous accounts in the trust, I feel that perhaps you may be able to disclose by exact figures what these benefits are. The very appraisement of the assets of the trust made by three appraisers as to the values on June 30, 1912, shows in itself the great benefits that have accrued to the capital under the agreement made with me by which properties were allowed to be withheld from sale."

This letter, in connection with the report of the majority trustees and the oral argument of their attorney, exhibits one

of the difficulties in dealing with this subject matter. The income beneficiary, a trustee, and his attorney, also a trustee, who was also the attorney for the board of trustees on former accounts, and on this accounting the attorney for the majority, consisting of the income beneficiary and himself, occupying a position that may conflict with the interest of the remaindermen. To say that this condition is not probable in this case is not to the purpose, for it is possible in this, as in any other case. The mere fact that the income beneficiary is the sole heir at law and that the remaindermen are his children, does not alter the legal situation. In his letter, already quoted from, he says:

"I am very much embarrassed about asking the court to protect my strict rights since the fire under the plain terms of the agreement made with me, because as you know from the beginning of the trust I have thought more of the capital rights—they are my children—than I have of my own rights, and my desire and my action also has always been to do everything to advance the interests of the capital. If I should insist on my strict rights under this agreement it would require that a very considerable sum be paid to me in view of my lost income rights for the six years ending with this account—that is, up to June 30, 1912; but as I have said I am embarrassed in making up my mind whether I should do this. If I should do so I do not see how any just complaint could be made by anyone, and I feel certain that my children would not do so, because under the agreement made with me following the fire, the interests of the capital in the real properties have been brought up to almost normal values, and the tremendous depreciation that the Spring Valley stock suffered has been avoided, by being able to hold it, and the capital as to that matter alone has received a very large benefit."

The suggestion in this letter as to the writer's embarrassment in making up his mind whether he should insist on his strict rights, under the special agreement, is in accord with the intimation of the majority trustees on page 176 of their

report, that it may be that the income beneficiary will be reluctantly forced "to claim his technical rights under his agreement aforesaid with the trustees, providing 'that said beneficiary's income rights . . . should be deemed preserved and protected.'" It is pointed out by the minority trustee that while the income beneficiary, in his capacity as such, and himself and his cotrustee as such, deny the right to question the binding effect of former adjudications, they assert his and their right to disregard such adjudications if they can give the agreement a meaning and effect which would yield him larger results. There might seem to be some inconsistency in this attitude of the majority trustees, one of whom is the income beneficiary and the other his attorney and cotrustee. Trustee Woods, who is also the income beneficiary, prays for the settlement of the account as presented, and yet, in his letter, says that he does not mean to waive his greater rights under the special agreement made between the trustees and himself following the fire.

In this connection, incidentally, it may be serviceable to advert to the distinction drawn by Mr. Lyons in his oral argument between an income beneficiary and a life tenant. The court has just described the children as remaindermen, which, technically, means those who are entitled to the remainder of the estate after a particular estate carved out of it has expired, so that strictly this may be a misnomer; so with the term "life tenant." On pages 39 and 40 of Mr. Lyons' oral argument, in commenting upon the position of Trustee Hedger as to income rights, he says that it would seem to rest upon the rule for determining net income in the case of a life tenant of a legal estate—for his separate report refers to the income beneficiary, Mr. Woods, throughout, as a "life tenant." But the case at bar as to income rights is not that of a "life tenant," much less that of a life tenant of a legal estate. We have here a "trust"—a statutory trust, and the simple fact of such a trust stands opposed to any theory involved in the rights of a life tenant of a legal estate. The latter has powers and rights, and an estate,

which is not at all predicable of the income beneficiary of a statutory trust. A legal life tenant has not only an actual estate against all the world, in the property or properties of which he is life tenant, but the nature of his estate is such that he is in effect the owner of the properties during his life, excepting that he cannot dispose of them. And so he has unrestricted power and right to manage and handle the properties as he sees fit, save only that he cannot commit waste as to the inheritance. On the other hand, an income beneficiary of a statutory trust is destitute of any estate, and of any such powers and rights of ownership. He has "no estate or interest in the property, but may enforce the performance of the trust." (Civ. Code, 863.) And of course he has no power of any kind in the management or handling of the trust properties, or the administration of the trust or its affairs; and while he may complain, if he deems the occasion requires, that the trustees are not carrying out the "trust" in accordance with, or having just regard, for his rights, and may invoke the court's aid to "enforce the performance of the trust," the "performance" still remains with the trustees—the management and handling of the trust assets, and the administration of the trust and trust affairs generally, and in every particular.

In answer to the assertion that this is not a case of life tenant and remainderman, and that the rules applicable to such relation are not to be applied here, attention is called to the language of the trustees in their fifth report, page 31, wherein the income beneficiary is described as in effect a life tenant. It should seem, therefore, that the majority trustees hitherto have drawn no such distinction as is now asserted, in principle, between the income beneficiary and a life tenant, but, on the contrary, have treated both, for the purpose of these accountings, as the same; and one of the authorities, cited by the attorney for the majority trustees, seems to support the view that the terms, if not identical, may sometimes be used synonymously, for that authority says:

"A trustee should pay all taxes legally and rightfully imposed upon the trust estate, for defraying which he should resort to the income rather than the principal, or the estate of the life tenant rather than to that of the remainderman": 28 Am. & Eng. Ency. of Law, 2d ed., p. 1055.

Reverting to the special agreement so repeatedly asserted by the majority trustees as affirmed and ratified and adjudicated by the court, and thereby constituting a rule of decision for all subsequent accountings during the existence of certain conditions referred to therein and described as a solemn contract between the trustees and the income beneficiary of an inviolable character, and so in effect determined by this court in the settlement of the fifth, sixth and seventh annual accounts of the trustees of this trust, the power of the trustees to engage in any such agreement or arrangement as it is described by the attorney in his oral argument, and on page 136 of the majority report, may be questioned. So far as the court recalls, no formal document of the character described was ever submitted to the court, and assuming that they had the right to enter into any such arrangement or agreement, there is no explicit evidence of its contents and execution, except the fact that its supposed substance was adopted and ratified by the court in the settlement of several accounts. See page 48 of the Report of the Majority Trustees on this account. See, also, pages 10 and 11 of Mr. Lyons' oral argument, in which he says that this agreement, approved and acted upon by this court, is clear in its terms, and specific as to its intent as regards the income beneficiary; and that it involved the obligation of the trust and the stipulation of the trustees that said beneficiary's income rights in the properties so held should be deemed preserved and protected, the amount of such income rights from time to time—annually or otherwise—to be fixed or adjusted between the trustees and the beneficiary, or by or with the advice of this honorable court.

On the other hand, counsel for the minority trustee characterizes this arrangement as vague and ambiguous, even if it

were within the power of the parties to undertake to make the "income rights" of the beneficiary any greater than they already were under the law and the terms of the instrument creating the trust. This counsel asserts that so far as this agreement being clear and specific in its terms, and as to its intent, there is nowhere any explicit statement of such terms, but everywhere the same vague, elastic description of it as an "arrangement and agreement" under which "the trustees were and are enabled to hold 'said properties until such time (if possible) as normal conditions' might come about," and which "involved" somehow "the obligation" somehow created "of the trust, and the stipulation of the trustees" that the income rights, whatever they are or may be, "should be deemed preserved and protected"—something, of course, legally obligatory on the trustees without any express stipulation therefor on their part. The agreement referred to is stated to have been an agreement that certain properties should be withheld from sale at a sacrifice and that in the meantime the life beneficiary's "income rights" should be preserved. In his points and authorities, this counsel says, that no attempt is made in the agreement to define these "income rights," but it is assumed, in the majority report, that they included the right to insist upon an immediate sale at a sacrifice of all the unproductive property, and the investment of the proceeds in productive property. He asserts that it was shown on the oral argument that no such right as this existed, and that the assumption of its existence was fallacious, as were also other assumptions of the majority report, in the same connection, to wit, that the proceeds of sales would not have been judiciously invested; that sales could have been made and proceeds invested without loss of time, if insisted on by the income beneficiary; that such a course would have been of advantage to the income beneficiary, and would have placed him in the continued receipt of the income enjoyed before the fire; that the existence of the agreement was entitled to credit for the improvement in the value of the Spring Valley stock, any more than for the

loss in value on securities of Ocean Shore or United Railroads.

This counsel claims also that the agreement or arrangement had been at least fully performed on the trustees' part, and that the income beneficiary has received more than all he could possibly claim thereunder, and in support of this assertion, he adduces certain figures which need not be here repeated. He admits that the payment of what the income beneficiary has received before this has been approved by the court's decrees of settlement of the accounts showing such payments; but the quantity and sufficiency of such payments remain the same nevertheless; and if the income beneficiary has been thereby already overpaid, that is not a good reason why such overpayment should be continued.

With reference to the finality of the former accounts, as to the items contained therein, sufficient has been said by the court, and the court does not understand that counsel disputes its conclusions or denies the appositeness of the authorities cited.

The only questions reserved in this accounting are concerning the alleged agreement between the trustees and the income beneficiary, and the apportionment of certain expenses between capital and income.

It is strenuously contended by the majority trustees, as such, and by the income beneficiary, as such, and their counsel, as such, that this court is irrevocably committed by its settled rulings to the legal validity, virtue and effect of that agreement, according to their construction, and that they had a right to fix and adjust the amount of the income rights—from time to time—either between themselves, or by or with the advice of the court. This contention involves the assumption that they need not have recourse to the court in the first instance, but may act of their own motion in making an oral or written agreement affecting the terms of the testamentary trust, which is the sole source of their existence, authority and power, and a limitation upon their official faculties, relying upon the subsequent sanction or ratifica-

tion of their act by the court, under whose supervision they are supposed by the law to conduct their trust. The justification for this assumption is based upon the unusual conditions which followed the fire of 1906, which brought into operation considerations of equity on account of the great losses suffered by the income beneficiary, in the deprivation of his revenue under the trust, and that, therefore, the trustees had the right to agree with him so as to restore, as far as possible, his losses. The equitable considerations, upon which the judgment of the court is now invoked, and which are said to have influenced its rulings on the former accounts, are set forth at some length in the oral argument of Mr. Lyons, on pages 18 to 21. The losses incurred by the income beneficiary were those suffered by all the people and property holders of this city, in a common calamity, and involved many trust interests, life tenants, income beneficiaries, remaindermen, as well as individual proprietors; but these incidents of the disaster did not change the rules of law respecting species of tenure. There is no reason why, in the estimation of this court, any rule should apply to one case rather than to the others, unless there be some exception based upon the language of the instrument upon which the rights of the claimant are dependent; that instrument is incorporated in the decree of final distribution in the estate out of which this testamentary trust arises, which decree, in so many words, gives the income beneficiary the entire net amount of the rents, issues, profits and income of said real and personal property, and of, to wit, the trust properties and estate as they may exist at any and all times during his natural life; and also with respect to the personal property hereinafter described (including any and all changes thereof, by investment, reinvestment, exchange or otherwise) to pay to or apply to the use of said Harry F. Woods, such amount or amounts from or out of the principal or capital thereof, as the trustees of the trust may determine, at any time, to be necessary for any special purpose personal to said Harry F. Woods; their

determination as to such necessity at any time to be in the unrestricted and absolute discretion of said trustees.

The majority trustees, in their report, on page 151, say, that upon the settlement of the first annual report of the trustees, this court was called upon to determine what were the income rights of the income beneficiary under the trust, "which provides that he shall receive all the income of the trust properties and trust estate, subject to the annuity of fifty dollars per month to Mrs. Robinson." There is an inaccuracy in this quotation. The trust does not provide that the income beneficiary shall receive all the income, nor does the decree so recite, but, by its exact terms, distributes the property to the trustees, in trust, to pay or apply "the entire net amount of the rents, issues, profits and income," to the use of the income beneficiary. Instead of receiving the gross, or all the income, the trust provided he should receive the net income only, and it was conceded in the oral discussion that if the word "net" had been omitted, he would still be entitled to no more than the net income. Net income is "the income derived from the whole property, less the necessary expenses incurred in its management, and disbursements incurred on account thereof": 29 Cyc. 671. This correction is necessary in order to emphasize the distinction between the terms said to be responsible for this controversy.

The majority trustees, on page 176 of their report, after presenting the case for the income beneficiary, and the figures which show the great loss that would occur to him if their suggestions should not be adopted by this court, say that the views outlined by them, on page 134 of their report, speak now with imperative force, so that the court may, of its own motion, deem it proper to take charge of the matter, in the interests of justice to the income beneficiary, and then there is an implied intimation that unless the court acts upon this suggestion, the income beneficiary will pursue a course in his own behalf to secure the rights to which he believed he is entitled.

This plea, presented so forcibly and imperatively, by the majority trustees, and emphasized by their attorney in behalf of the income beneficiary, would seem to leave no alternative to the court but to adopt the theory of the trustee beneficiary and the trustee attorney, and to confirm the agreement under consideration. It might be remarked collaterally that the remainderman should also be considered as included within the interests of justice, for the majority report seems to be devoted mainly to the rights of the income beneficiary, and the agreement, which the court is called upon finally to uphold, as protecting those income rights. What those income rights were and are must be determined by the instrument creating the trust, and although the court may heretofore have been induced in the absence of contest to pass an account or sign a decree seeming to accept such agreement, such judicial act has no force and effect beyond the settlements which have become final by operation of law, and which did not extend to the accounting now presented, in which it is an open question.

This agreement, presumably the composition of the attorney for the trustees, himself being a trustee, and included in the reports accompanying the other accounts, if approved and acted upon by this court, was so approved and acted upon, as in the case of other matters contained in the reports and accounts, by reason of its faith in the attorney and its confidences in the trustees, and the lack of any controversy as to its validity. In the opinion of the court the agreement was not conclusively acted upon, nor finally ratified, and there was nothing concluded except as to the accounts then presented and settled.

By that agreement, so far as the court understands its terms, it undertook to vary the testamentary trust in an important particular, thus departing from the decree of distribution which established and adjudicated that trust, and which conferred no power to alter it in any particular. Notwithstanding the unusual conditions so insistently relied upon by the majority trustees, it was not competent for anyone to

do this, for, if it could be done to any degree or extent, it might be carried further, and because of circumstances unanticipated and unapprehended by the trustor might lead to the defeat of his intention and the destruction of the trust so carefully designed by him. That this is possible may be illustrated by calculation of the financial effect consequent upon the continuance of the situation now presented to the court for a period within the rules of mortality, which might bring about the absorption of the principal in payment of income on the basis of this agreement; then what would remain for the children?

The discretion which the majority trustees claim was given them by the trust did not extend so far, and the court has no right or power, no more than have the trustees, to invite such a result.

This view of the court renders unnecessary any further consideration of this agreement or arrangement, in connection with this accounting, and brings us to the apportionment of certain expenses as between capital and income, which is the only remaining question.

The agreement aside, all that the income beneficiary can now receive is the net income of the trust property. We have already attempted to define what is meant by "net income," but that definition is sought to be limited or extended by the majority trustees and their counsel, who contend that previous court adjustments would be prima facie applicable as a proper "adjustment" of income rights for the four trust years of the present accounting.

This phrase "net income rights," so much used by the majority trustees, has no significance beyond the import of the expression used by the trustor in his testament and in the decree of distribution. The simple terms "net income" need no gloss or comment to explain their meaning. It is simply "net," not "gross," income, and that is what the income beneficiary derived through the testamentary trust, and no former adjustment, even if not now reviewable, as to the previous accounts, although they were left to the court

by the mutual consent of the then four trustees of the trust and the income beneficiary, can relieve the court in the present instance of the duty of meeting the issue for the first time presented in a seriously contested form.

If this view be correct, then the contention of the majority trustees cannot be sustained by the court; for if the disbursements excepted to by the minority trustee are to be properly considered as necessary expenses incurred in the management of the property, or incurred on account thereof, as distinguished from investments in the property itself, or changes in the character of the capital, then they should be deducted from the gross income to ascertain the net; otherwise not.

We have already dealt with the annuity as determined by the decree of distribution itself.

It is conceded that the taxes upon the unimproved property which produces no income should be paid out of the corpus of the estate; but the ordinary taxes of property in which there is a life estate, and the ordinary expense of the care and management of the principal, are charges upon the life estate, to be paid out of the income: Peirce v. Burroughs, 58 N. H. 302. It is laid down by the authorities that the insurance is a proper deduction from income: 2 Perry on Trusts, 5th ed., sec. 553.

A life tenant is not bound to insure the interest of the remainderman, but each may insure his own interest: Harrison v. Pepper, 166 Mass. 288, 55 Am. St. Rep. 404, 44 N. E. 222, 33 L. R. A. 239; De Witt v. Cooper, 18 Hun (N. Y.), 67. A trustee who holds the legal title for both has the duty of insuring; and accordingly insurance premiums paid by a trustee would probably be universally treated as an ordinary expense of holding and managing the property, and so payable out of income: Bridge v. Bridge, 146 Mass. 373, 15 N. E. 899. The general practice of trustees is to charge insurance premiums to income: Loring's Trustee's Handbook, 2d ed., p. 116.

All of these propositions are simply elementary.

As to the administrative expenses of the trust, to wit: Court and legal costs and expenses, office expenses and office administration, and salaries, trustees' compensation, it is almost universally decided that the expenses of managing a trust should come out of current income. It was held in Spangler's Estate, 21 Pa. St. 335, that the interest and not the principal of a trust fund must bear the expense of administering it. Were it otherwise, the entire principal might be absorbed in paying the trustee's commissions upon income. A trustee is entitled to a reasonable compensation for his services as they are rendered, and unless a contrary intention appear, the compensation must come out of the income of the fund in the administration of which it is earned: Butterbaugh's Appeal, 98 Pa. St. 351.

It was argued in the last cited case and by implication sustained, that as the intention of the trust was to sustain the estate intact for the children, the charges for administration of the trust and for taxes on money at interest should therefore be paid out of the income. If such payments be made out of the capital, the latter will be gradually consumed, and the time may come when there may be no fund left, and consequently no annual income. The children may then claim the whole corpus of the fund and the decree entered in the court below would afford the trustee no protection: Spangler's Estate, 21 Pa. St. 335.

The question as to the payment of the interest on the trust indebtedness, which it is proposed to charge against capital entirely, is not correctly so chargeable, according to the authorities, as the court reads them, for the rule is stated that the equitable tenant for life must pay the interest upon all encumbrances upon the estate, to the extent of the rents and profits: Perry on Trusts, sec. 553.

Interest on an encumbrance on the property, for example a mortgage, must be paid by a life tenant, although it would not be safe for a remainderman as against the mortgagee to rely on the liability of the life tenant to pay the interest: Martin v. Martin, 146 Mass. 517, 16 N. E. 413; Plympton v.

Boston Dispensary, 106 Mass. 544. Similarly, a trustee who places an encumbrance on property, or allows one to remain, should pay the interest out of income. If the trustee pays off the principal of the encumbrance he should pay it out of the principal of the trust fund of which both the life tenant and remainderman are beneficiaries: Martin v. Martin, 146 Mass. 517, 16 N. E. 413; Plympton v. Boston Dispensary, 106 Mass. 544.

If a remainderman pays off the encumbrance, the life tenant must continue to pay interest to the remainderman, or, what is more usual, must pay to the remainderman the present worth of an annuity equal to the annual interest running during the number of years which constitute the expectancy of life of the tenant for life: Moore v. Simonson, 27 Or. 117, 39 Pac. 1105; Plympton v. Boston Dispensary, 106 Mass. 544; 4 Kent, 14th ed., p. *74; Stevens v. Melcher, 152 N. Y. 551, 46 N. E. 965.

In accordance with the principles stated in the foregoing opinion, a decree settling the accounts in question was filed on the 6th day of October, 1914.

Memorandum.—The item of interest on trust indebtedness, $30,927.62, was corrected by the court by subtracting therefrom $2,253.89, making the true sum chargeable in that behalf, $28,673.73.

ESTATE OF JULIA C. MORAGHAN, DECEASED.

[No. 21,239; April 5, 1899.]

Administrator—Rivals for Appointment—The Daughter of the Intestee, who has been granted special letters of administration, is in this case granted general letters, as against the public administrator and a son who, by reason of dissolute habits, is incompetent to act.

Administrator—Person Incompetent to Act.—A person who has dissolute, intemperate and improvident habits is not competent to act as administrator of his father's estate.

Administrator—Person Incompetent to Nominate.—One who, by reason of dissolute, intemperate and improvident habits, is incompetent to act as administrator of his father's estate, has no right to nominate his copetitioner, the public administrator, to act as administrator in his place, or to nominate him to act jointly with the public administrator.

Henry N. Clement and Jabish Clement, for Elsie L. Moraghan.

James H. Creely, Daniel E. Mooney, for James B. Moraghan.

A. Ruef, for public administrator.

COFFEY, J. Julia A. Moraghan, a widow, possessing estate and residing and carrying on business in the city and county of San Francisco, state of California, died intestate at said city and county on the 2d day of February, 1899, leaving surviving her as her next of kin and only heirs at law, eight children, whose names and ages are set forth as follows: John O., 24 years; Elsie L., 22 years; James B., 21 years; Charles A., 18 years; Eugenie J., 16 years; Francis H., 14 years; Milton B., 10 years, and Eugene W., 7 years.

John O., though of lawful age, is incompetent to administer upon the estate, having been adjudged an insane person. James B., the only other son who is of lawful age, was absent from the state at the time of his mother's death. Elsie L., a daughter of lawful age, filed her petition on the 6th day of February, 1899, praying that special letters of adminis-

tration issue to her. Her application was assigned by the presiding judge to Department 9 for hearing, under calendar Number 21,239, and she was thereupon appointed special administratrix. She immediately qualified and special letters were issued to her.

Thereafter, on the 18th day of March, 1899, Elsie L. filed her petition with the clerk of the court praying for general letters. Her petition was filed by the clerk under the calendar Number 21,239, originally given the estate, and March 1, 1899, was fixed as the day for the hearing thereof in Department 9.

Prior thereto and on the 17th day of March, 1899, James B. Moraghan (who had returned to the state of California), filed his petition for letters of administration with the clerk of the court, through his attorneys, D. E. Mooney and J. H. Creely, who requested of the clerk that their petition be filed under a new calendar number and assigned to some other department of the court than Department 9. They were informed by the clerk that this could not be done unless they would obtain from the presiding judge an order assigning the hearing of their petition to some other department, after explaining to them that the estate was now pending in Department 9.

Said attorneys thereupon appeared before the presiding judge, and without calling his attention to the fact that the estate had already been assigned to Department 9, and that special letters had been issued therein to Elsie L. Moraghan, stated to him that on account of some ill feeling existing between their client and the judge presiding in Department 9, they requested that their petition be assigned for hearing to any other department than Department 9, and the presiding judge thereupon, without knowing that he had already assigned said estate to Department 9, assigned the same to Department 10.

Said attorneys thereupon took the assignment thus obtained to the clerk of the court, who filed the same and also the petition of the said James B. Moraghan, under a new and different calendar number, viz., No. 21,293, and fixed the

time for the hearing thereof for the 1st day of March, 1899, in Department 10.

Thereafter, on February 27, 1899, said attorneys moved the court in Department 9 that an order be made transferring the estate of decedent and all further proceedings therein to Department 10. The motion was opposed by counsel for Elsie L. Moraghan upon the ground that the counsel for James B. Moraghan had already obtained the order of assignment from the presiding judge in the manner above set forth, and that the proper place to make a motion for transfer was before the presiding judge. The motion was thereupon denied.

Thereafter, on February 28, 1899, said attorneys for James B. Moraghan, after notice to the attorneys for Elsie L. Moraghan, appeared before the presiding judge and moved for an order assigning the said estate to Department 10. The motion was opposed and the presiding judge, after the hearing, made an order vacating and setting aside his order of assignment made on the 17th day of February, 1899, and ordered that the petition of James B. Moraghan be heard before Department 9.

Thereafter, on March 1, 1899, the petition of Elsie L. Moraghan and James B. Moraghan both came on for hearing in Department 9. George B. Keane, an attorney representing John A. Drinkhouse, public administrator, announced to the court that James B. Moraghan desired to withdraw his petition for letters and nominate the said Drinkhouse in his stead, and D. E. Mooney, appearing as attorney for James B. Moraghan, thereupon moved to dismiss the petition of his client, and the same was thereupon dismissed. The said Keane then moved the court that the further hearing of the petition of Elsie L. Moraghan be postponed until the day fixed for the hearing of the petition of the said Drinkhouse. The court denied the motion upon the ground that the petition was not on file, and ordered the hearing on the petition of Elsie L. Moraghan to proceed, and the same was duly heard upon proofs being made of the facts set forth in her petition. After said hearing, however, and before an order of appointment had been made, A. Ruef, attorney for said

public administrator, appeared in open court with the petition of said Drinkhouse, which had just been filed with the clerk, in which said Drinkhouse, as public administrator, prayed that letters issue to him upon the written request of James B. Moraghan. The counsel then moved that all further proceedings be stayed until due and legal notice had been given of the time of hearing of the petition of the said Drinkhouse, which motion was granted and the further hearing of the petition of Elsie L. Moraghan was continued until the 14th day of March, 1899.

Thereafter, on the 14th day of March, 1899, both petitions came on for hearing, and A. Ruef moved in court to dismiss the petition of John A. Drinkhouse, public administrator, which motion was granted by the court, and the same was thereupon dismissed. He then announced to the court that a petition signed by the said James B. Moraghan and John A. Drinkhouse, praying that letters of administration be issued to them jointly, had been filed with the clerk on the day previously, viz., on March 13, 1899, and that the same had been set for hearing for March 28, 1899; and moved that the further hearing of the petition of Elsie L. Moraghan be continued until said date, which motion was granted by the court.

Thereafter, on the 28th day of March, 1899, both said petitions came on for hearing, Elsie L. Moraghan having filed her verified answer and opposition to the granting of letters to said James B. Moraghan and John A. Drinkhouse, alleging the facts hereinbefore set forth, and further alleging that the said James B. Moraghan was incompetent to act as administrator by reason of his dissolute habits, improvidence in the expenditure of money, and being addicted to the habit of drinking intoxicating liquors to such an extent as to render him disqualified from attending to business a great portion of the time; further alleging that his copetitioner, John A. Drinkhouse, was not in any way related to the decedent or entitled to succeed to any portion of the personal estate of the decedent, but that he applied solely in his official capacity as public administrator and upon the written request of his copetitioner, James B. Moraghan; further alleging that she

was the duly appointed, qualified, and acting guardian of the person and estate of her brother, the said John O. Moraghan, an insane person; and was also the duly appointed, qualified, and acting guardian of all her minor brothers and sisters, viz., of Charles A., Eugenie J., Francis H., Milton B., and Eugene W. Moraghan, the three eldest of whom being 14 years of age and over, had filed their written request for her appointment.

The court thereupon proceeded with the hearing of said petition and the answer and opposition filed by the said Elsie L. Moraghan, and from the testimony of witnesses introduced and sworn in open court, determined that the allegations in the answer and opposition of the said Elsie L. Moraghan were fully sustained by the evidence.

CONCLUSIONS OF LAW.

Upon the foregoing facts, the court found the following conclusions of law:

First—That as between the petitioner, Elsie E. Moraghan, and the petitioners James B. Moraghan and John A. Drinkhouse, public administrator, the said Elsie L. Moraghan is entitled to administer upon the estate of decedent, Julia A. Moraghan.

Second—That the petition of the said James B. Moraghan and John A. Drinkhouse, public administrator, should be and is hereby denied and the petition of the said Elsie L. Moraghan should be and is hereby granted.

Third—That the petitioner, James B. Moraghan, is legally incompetent to act as the administrator of the estate of the decedent, Julia A. Moraghan, by reason of his dissolute and improvident habits, in the expenditure of money and his habit of drinking intoxicating liquors to such an extent that, by reason thereof, he is disqualified a great portion of the time from properly attending to business.

Fourth—That by reason of his said incompetency the said James B. Moraghan has no legal right to nominate his co-petitioner, John A. Drinkhouse, as public administrator or otherwise, to act as such administrator in his place and stead

or to nominate him to act jointly with said John A. Drinkhouse as coadministrator.

As to Improvidence, Drunkenness and want of understanding or integrity as disqualifying a person to act as administrator, see Estate of Piercy, 3 Cof. Prob. Dec. 473.

NOMINATION OF ADMINISTRATOR.

The right of a surviving husband or wife to nominate an administrator of the estate of the deceased wife or husband is absolute under the terms of the statutes: Cotter's Estate, 54 Cal. 215 Matter of Stevenson, 72 Cal. 164, 13 Pac. 404; In re Dorris, 93 Cal. 611, 29 Pac. 244; Matter of Dow, 132 Cal. 309, 64 Pac. 402; In re Stewart, 18 Mont. 595, 46 Pac. 806; In re Watson, 31 Mont. 438, 78 Pac. 702; McLean v. Roller, 33 Wash. 166, 73 Pac. 1123. See, also, Matter of Muersing, 103 Cal. 585, 37 Pac. 520; Matter of Donovan, 104 Cal. 623, 38 Pac. 456; Matter of Shiels, 120 Cal. 347, 52 Pac. 808; In re Wakefield, 136 Cal. 110, 68 Pac. 499; Daggett's Estate, 15 Idaho, 504, 98 Pac. 849; State v. Woody, 20 Mont. 413, 51 Pac. 975.

In the case of other persons other than the husband or wife, the right of nomination is advisory only, and the petition of the person entitled to letters of administration praying for the appointment of another as administrator is addressed to the mere discretion of the probate judge, who may properly, if he sees fit, appoint someone other than the person nominated: In re Bedell, 97 Cal. 339, 32 Pac. 323; Matter of Healy, 122 Cal. 162, 54 Pac. 736; Daggett's Estate, 15 Idaho, 504, 98 Pac. 849; Sargent's Estate, 62 Wis. 130, 22 N. W. 131. See, also, In re Watson, 31 Mont. 438, 78 Pac. 702. And see Larson v. Stewart, 69 Wash. 223, Ann. Cas. 1914A, 1011, 124 Pac. 382, as to the right of creditors of the decedent to nominate the administrator. The petition of one of such relatives who is a nonresident of the state, and therefore is not himself entitled to letters of administration, is a legal nullity: In re Craigie, 24 Mont. 37, 60 Pac. 495. In the case of In re Bedell, 97 Cal. 339, 32 Pac. 323, the difference between sections 1365 of the California Code of Civil Procedure, giving to the surviving husband or wife the right to nominate some competent person as administrator, and section 1379, providing that "administration may be granted to one or more competent persons, although not otherwise entitled to the same, at the written request of the person entitled, filed in the court," was pointed out. It was said not to be essential to an appointment by a surviving husband or wife, that the husband or wife should be competent, himself or herself, to act as administrator, while under section 1379 only one competent to act as administrator was entitled to nominate a person to act in his stead. To the same effect, see In re Robie, Myr. Prob. 226 (as to section 1365); Cotter's

Estate, 54 Cal. 215 (as to section 1379); Beech's Estate, 63 Cal. 458, and Matter of Stevenson, 72 Cal. 164, 13 Pac. 404. And In McLean v. Roller, 33 Wash. 166, 73 Pac. 1123, a surviving husband was held to be entitled, under the Washington statute (Bal. Code, sec. 6141), to nominate the administrator of his wife's estate, although he himself was incompetent to act as such because of his conviction of felony. Furthermore, in Morgan's Estate, 53 Cal. 243, and in Matter of Richardson, 120 Cal. 344, 52 Pac. 832, it was held that the provision of section 1379 did not require the court to appoint the nominee of the person entitled, as in the case of a surviving husband or wife, but merely placed the appointment in the discretion of the court.

The court has no discretion to appoint the nominee of one or more of a class, each of whom is equally entitled to letters, as against one of the same class who asks for the grant of letters to himself: In re Myers, 9 Cal. App. 694, 100 Pac. 712.

In Matter of Dow, 132 Cal. 309, 64 Pac. 402, the right of a surviving wife to administer on the estate of her deceased husband was held not to be affected by the circumstance that since the death of her husband she had remarried, and it was therefore held that if she declined the administration, she was entitled to nominate the person to be appointed administrator. But compare Matter of Allen, 78 Cal. 581, 20 Pac. 426.

While the executor named in a will proved in another jurisdiction is not entitled to nominate the administrator cum testamento annexo on the admission of the will to probate, the appointment of the person named by him is not error of which the public administrator can complain: Matter of Harrison, 135 Cal. 7, 66 Pac. 846.

One entitled to administer, who has signed a written request for the appointment of another, and has encouraged such other person to go to the expense and trouble of applying for the office, is estopped, it has been held, from withdrawing his renunciation: Kirtlan's Estate, 16 Cal. 161; Silvar's Estate, 5 Cal. Unrep. 494, 46 Pac. 296. And in the case of In re Bedell, 97 Cal. 339, 32 Pac. 323, it was held that a request in due form for the appointment of a particular person, under section 1379 of the California Code of Civil Procedure, vested in the court a discretion to appoint such person, and was not rendered ineffective by a subsequent request signed by the same person for the appointment of the public administrator. But in Matter of Shiels, 120 Cal. 347, 52 Pac. 808, it was held that the fact that the widow of a decedent had requested the appointment of a certain person as administrator in her stead did not estop her from revoking her request, and that whether there were attendant circumstances which would authorize the court to give greater weight to her request than to her withdrawal of it was a matter for the determination of the court of first instance.

While the California statute authorizes the issuance of letters testamentary to a nonresident executor, it does not entitle him to letters of administration, and hence section 1379 of the Code of Civil Procedure, which provides that letters of administration may be granted to one or more competent persons, although not otherwise entitled to the same, at the written request of the person entitled, does not authorize the appointment of such a person at the request of a nonresident executor: Matter of Brundage, 141 Cal. 538, 75 Pac. 175.

In the case of In re Woods, 97 Cal. 428, 32 Pac. 516, it was held that while the California statutes (sections 1365, 1368, 1369, and 1379) were somewhat confusing as to the point whether a minor was a "person entitled," and therefore as to whether the guardian of a minor might be granted letters of administration, yet that assuming that the guardian of a deceased minor had some right to letters, still he had such right merely as the representative or in place of the minor, and did not come within any one of the classes of persons enumerated in section 1365 as persons to whom administration must be granted, and that therefore such guardian's written request could not confer on the person named the right to administer.

By the terms of section 1383–1385 of the California Code of Civil Procedure, if letters of administration have been granted to any other person than the surviving husband or wife, child, father, mother, brother or sister of the intestate, a surviving husband or wife is entitled to have letters issued to any competent person whom he or she may select; but if letters are granted to a surviving brother of the intestate, a surviving wife's rights are governed by section 1386. Her only right thereunder is to have letters issued to herself, and she is not entitled to have letters issued to some other competent person: Matter of Shiels, 120 Cal. 347, 52 Pac. 808. And so under section 5366 of the Idaho Revised Statutes, where any person not a member of one of the first five classes enumerated in section 5351 has been appointed administrator, the appointment may be revoked on the petition of any member of such five classes who is himself competent to administer, or on the application of his or her nominee, and thereupon letters shall be granted to some of the members of such five classes petitioning therefor, or to some competent person designated by a member of one of these classes: Daggett's Estate, 15 Idaho, 501, 98 Pac. 849. But section 66 of the California act to regulate the settlement of estates of deceased persons has been held to refer only to cases where there was a vacancy in the administration, and the wife, child, father, mother or brother of the intestate was held to be authorized to have letters granted to another revoked only on presenting a petition praying for the appointment of himself or herself as administrator: Carr's Estate, 25 Cal. 585.

ESTATE OF JULIA H. TRACY, DECEASED.

[No. 21,316; June 24, 1899.]

Revocation of Letters of Administration—Competency of Parties.—Where letters of administration with the will annexed have been granted to the public administrator on the estate of a deceased nonresident, a resident brother of the decedent, though not entitled to letters on an original application because of section 1365 of the Code of Civil Procedure, may nominate a stranger to petition for a revocation of the letters granted and for the issuance of letters to the petitioner, and the petition will be granted, both the nominor and the nominee being competent, under section 1369 of the Code of Civil Procedure, to serve as administrators.

Elliott McAllister, for application.

A. Ruef, contra.

COFFEY, J. The petition filed herein prays for a revocation of the letters of administration, with the will annexed, heretofore issued to John A. Drinkhouse, public administrator of the city and county of San Francisco, and for their issuance to the petitioner. The petition is filed in conformity with section 1383 of the Code of Civil Procedure, which reads as follows:

"Section 1383. When letters of administration have been granted to any other person than the surviving husband or wife, child, father, mother, brother, or sister of the intestate, any one of them who is competent, or any competent person, at the written request of any one of them, may obtain the revocation of the letters, and be entitled to the administration, by presenting to the court a petition praying the revocation and that letters of administration may be issued to him."

THE FACTS.

The petition is presented by A. C. Bingham. Hiram T. Hutchinson, a brother of the deceased, has filed a written request for the revocation of the letters of administration issued to John A. Drinkhouse, public administrator, and for issuance of the letters of administration to the petitioner. The deceased was a nonresident of California and died in Connecticut. She left there two children of full age, neither of

whom is a resident of the state of California. The will of the deceased was admitted to probate in the state of Connecticut, and by authenticated copy was admitted to probate in the state of California. The deceased left neither husband, child, father or mother who was a resident of the state of California. Hiram T. Hutchinson is a resident and a brother of said deceased, is not under the age of majority, and has not been convicted of an infamous crime, and has not been adjudged by any court incompetent to execute the duties of the trust by reason of drunkenness, improvidence or want of understanding or integrity. A. C. Bingham, the petitioner, has similar qualifications, excepting only that he is not a relative of the deceased.

THE LAW.

Section 1383 limits the petition to one who is competent; to a competent one of certain relatives or to the competent nominee.

In section 1369 the legislature has stated who is not competent in the following words:

"Section 1369: No person is competent or entitled to serve as administrator or administratrix who is

"1. Under the age of majority;

"2. Not a bona fide resident of the state;

"3. Convicted of an infamous crime;

"4. Adjudged by the court incompetent to execute the duties of the trust, by reason of drunkenness, improvidence, or want of understanding or integrity."

It is submitted, therefore, that the facts exist and that every requirement of the statute is fulfilled.

Hiram T. Hutchinson fulfills all the requirements of a nominor; A. C. Bingham all the requirements of a nominee.

Section 1385 makes it mandatory on the court to revoke the letters and issue them to the nominee.

"Section 1385. At the time appointed, the citation having been duly served and returned, the court must proceed to hear the allegations and proofs of the parties and if the right of the applicant is established, and he is competent, letters of administration must be granted to him, and the letters of the former administrator revoked."

A. C. Bingham is the applicant; he has established his right by presenting his written nomination, and he is competent. The question is, Can Hiram T. Hutchinson nominate? Has he the right? He has such a right.

It may be contended that he cannot nominate because he himself is not entitled to letters of administration on an original application therefor, by reason of the limitation of section 1365, which says:

"The relatives of the deceased being entitled to administer only when they are entitled to succeed to his personal estate or some portion thereof."

This amendment was made in April, 1878 (Stats. 1877–78, p. 111). And therefore the conclusion will be that the legislature by that section intended to deny a relative any participation in the administration of the estate and any right to nominate, and any right under section 1383 to petition for a revocation of letters of administration. In support of this latter view of the legislative intent it may be noted, also, that section 1369 was amended at the same session by inserting the words "or entitled" and the words, "2. Not a bona fide resident of the state"; so that the section reads as above quoted. (Stats. 1877–78, p. 112.)

On the other hand, there can be found no intention expressed in the sections accompanying section 1383 to limit the competency of a nominor, except as clearly stated in section 1369. Had the legislature intended to limit a brother who is competent to nominate and petition for revocation of letters of administration, it had a special opportunity at which to express such intention, because the words, "who is competent or any competent person at the written request of any one of them," were inserted at the session of 1880 (Stats. 1880, p. 80); that is, at the session following the amendment that "entitled" the relatives to apply in the first instance for letters of administration, only when he could succeed to the personal estate.

The legislature was careful to harmonize section 1369 with the amendment of section 1365, by use of the word "entitled," and on the amendment at the following session of section 1383 it did not see fit to place that limitation on the

right of certain specified relatives, i. e., the first five classes of section 1365, to petition for a revocation of letters. On the contrary, the legislature amended by using the word "competent" and not the word "entitled." Had the latter word been used, there could have been no question, and the present petition could not be presented. But the legislature has used the word "competent" as a limitation of the relatives as well as of their nominees. Had the other view been intended, then the amendment of 1880 should have read, "Any one of them who is entitled or any competent person at the written request of any one of them who is entitled."

It cannot be argued fairly that the legislature intended to use the adjective "competent" with two different meanings in one sentence. The same definition must be given to the word in each instance, and that definition must be found in section 1369; it cannot be that the competency of a relative is to be measured by any standard other than that applied to the competency of a stranger.

The supreme court has held that section 1383 applied to a case of testacy as well as of intestacy: Estate of Li Po Tai, 108 Cal. 484, 41 Pac. 486.

After a careful examination of the reports, this court cannot find any decisions on a similar statement of facts, and but few that can assist in the determination of this question. Of the many cases with reference to letters of administration, most of them were on original application.

In Estate of Beech, 63 Cal. 458, the deceased was a nonresident; no heirs or relatives were in California; the nonresident son nominated a resident stranger. The court denied this right and interpreted section 1367, with which section the present facts have nothing to do.

In Estate of Garber, 74 Cal. 338, 16 Pac. 233, the deceased was a nonresident; there was no resident relative; the nonresident relative made the nomination; this was refused.

In Estate of Bedell, 97 Cal. 342, 32 Pac. 323, the nominee of the resident father and mother was granted letters in opposition to the petition of the public administrator.

In Estate of Bergin, 100 Cal. 376, 34 Pac. 867, the deceased was a nonresident and the applicant a resident devisee, who was held to be a person "interested in the will."

In the Estate of Muersing, 103 Cal. 585, 37 Pac. 520, the deceased, a resident, left no resident relatives. His nonresident father nominated a stranger. Petition denied.

In Estate of Li Po Tai, 108 Cal. 484, 41 Pac. 486, we find a petition for revocation of letters granted the public administrator. The resident son made application. The questions were, Did section 1383 apply to testacy, and did the petitioner have sufficient intelligence Both were decided affirmatively.

In Estate of Richardson, 120 Cal. 345, 52 Pac. 832, the deceased was a resident; there were no resident relatives; the nonresident executor and a resident devisee nominated a competent stranger. Petition was denied.

In Estate of Shiels, 120 Cal. 349, 52 Pac. 808, we find a decision that shows how strictly the court holds the applicant to the law as laid down in section 1383 et seq. The deceased was a nonresident; a resident brother obtained letters; the nonresident widow nominated a competent stranger who petitioned for revocation of letters and for his own appointment. The court held that it was too late; that under sections 1383–1386 were found her rights to revoke letters, and whatever might have been the nonresident widow's right to nominate the petitioner on the original petition for letters of administration, such right no longer existed; and her assertion of a prior right must be governed by sections 1383–1386.

And so in this case the court must control its action by the terms of the same sections.

In Estate of Healy, 122 Cal. 162, 54 Pac. 736, letters were granted to public administrator in opposition to petition of the nominee of the nephew and niece, the next of kin of intestate. The court held the rights of the nephew and niece to be wholly embraced within section 1379, and that the rulings of the court left it discretionary with the lower court.

In its decision the court has said: "The power to procure a revocation of letters, and the appointment of a nominee after letters have been issued to one not in the first five classes, and enumerated in section 1365 of the Code of Civil Procedure, is accorded to the members of those five classes and to their nominees by section 1383 of the Code of Civil Procedure."

It seems, therefore, that as the law stands to-day the right to revocation of the letters already issued is made absolute under the terms of sections 1383 and 1385 of the Code of Civil Procedure.

For the foregoing reasons the petition should be granted and the letters heretofore issued should be revoked, and such is the order of the court this day made and entered.

ESTATE OF JUSTIN LABARTHE, DECEASED.

[No. 1178 (N. S.); No. 33,522 (Old Number).]

Notice to Creditors—Decree Establishing—When Made.—An executrix, having caused notice to creditors to be duly published, is entitled to a decree establishing that due notice to creditors has been given, although the attorney for the estate, at whose office claims were by the notice required to be presented has removed his office, during the period designated in the notice, within which claims might be presented.

Notice to Creditors—Power to Give Further Notice.—Notwithstanding the removal of the executrix's place for transacting the business of the estate, the court has no power to direct the giving of a further notice.

Notice to Creditors—Change in Place of Presenting Claims—Rights of Creditors.—The decree establishing due notice to creditors should not be refused under these circumstances because of the bare possibility that there may exist some creditor who, by reason of the removal, has been unable to properly present his claim. Having been put on inquiry by the notice which was duly published, he is obliged to take such further steps as may be reasonable to ascertain the present place of business of the estate.

P. A. Bergerot, for Madeleine Labarthe, Executrix.

COFFEY, J. This is an application by Madeleine Labarthe, as executrix of the last will of Justin Labarthe, for a decree of this court establishing that due notice of the creditors of said decedent has been given.

It appears that on January 17, 1906, pursuant to the order of this court and to section 1490 of the Code of Civil Procedure, the executrix caused a notice to creditors in due form

to be published and that the publication has been duly made for the requisite number of times. An affidavit has been produced showing that the publication has in all respects been duly and regularly made. From the copy of the printed notice it appears that claims were required to be presented within ten months from said date at the office of Mr. Bergerot, attorney for the executrix, 306 Pine street, this city. The fire of April 18th entirely destroyed the building in which Mr. Bergerot's office was located, and since said date his office and the place for the transaction of the estate's business has been at No. 1019 Franklin street in this city. The question now arises, whether, after the expiration of the ten months prescribed by the notice, a decree of due publication of notice to creditors can be entered, or whether notice to the creditors must be given anew.

An examination of the authorities, as complete, perhaps, as is possible with the present library facilities, does not show any case directly in point upon this question. Some of the authorities, however, while not bearing directly upon the question, are very persuasive and indicate that under these circumstances the application for the decree should be granted.

Section 1492, Code of Civil Procedure, provides that after the notice is given (i. e., when the posting or publication, as the case may be, has been completed), and the affidavit of posting or of publication is filed, an order or decree "must be made" by the court, "upon" such affidavit, that legal notice has been given. This, it seems clear, indicates that the decree can be obtained as soon as the notice has been given, irrespective of what may subsequently occur during the period prescribed in the notice. I am not, of course, unmindful of the fact that the practice has been to wait until the four or ten months have elapsed, but this has probably been done as a matter of prudence and not because it was considered essential, and perhaps a decisive ruling upon this point has not heretofore been of much importance. But I think that these views are borne out by what is said in Hensley v. Superior Court, 111 Cal. 541–543, 44 Pac. 232, on the general question:

"A publication of proper notice thereunder, as in this instance, not less than the mimimum number of times required by the section, is a compliance with the law and constitutes legal notice to the creditors."

In MacGowan v. Jones, 142 Cal. 593, 594, 76 Pac. 503, in treating of this matter, it is said: "The preceding being in rem, and the statutory requirements of the notice having been fully complied with, it is binding upon all the world, excepting those who are entitled to relief under section 1493."

A case perhaps somewhat suggestive on this point is Roddan v. Doane, 92 Cal. 555, 28 Pac. 604, where it is held that the leaving of a claim at the attorney's office in the absence of the administratrix, to whom, by the notice, claims were required to be presented, was a sufficient presentation of the claim. The same doctrine is laid down in 8 American and English Encyclopedia of Law, second edition, page 1080, where it is said: "The statute of nonclaim, after it has once started to run, as a general rule, continues to do so, unless provision is made for its interruption by the statute, and the running of the statute has been held not to be interrupted either by the removal or the absence of the executor or administrator from the state."

To the same point, also, is the case of Douglass v. Folsom, 21 Nev. 441, 33 Pac. 660.

From these last authorities, it may be inferred that the absence of the administrator, however caused, could not operate to defeat the creditor's right.

Nor is it clear whether, in the present instance, an additional notice could well be directed to be given, in view of the holding in Johnston v. Superior Court, 105 Cal. 666, 39 Pac. 36, that after the period designated in the notice has expired, the court is without jurisdiction to extend the time so limited by ordering an additional notice to be given.

That the change of the administrator's residence or place of business, during the period designated in the notice, should not be deemed to require the giving of a new notice is also suggested because of the fact that section 1490 requires that in case of the removal or resignation of the executor before the time expressed in the notice, his successor need give

notice only for the unexpired time allowed for presentation. As this is the only instance in which the statute contemplates the giving of a further notice, the rule of inclusio unius seems to be applicable.

The main argument in support of a contention that a new notice to creditors should be given would probably be rested upon the ground that a creditor might otherwise lose the opportunity of presenting his claim, should the place for presentation of claims be changed without legal notice of such change being given to him, but to this there would appear to be several replies.

Thus, such a change might well hold to excuse delay in presentation, the delay being caused in attempting to ascertain the administrator's whereabouts, or else, as suggested by some of the authorities already cited, the claim might be left at the designated place irrespective of the administrator's absence, and such presentation would be a sufficient one and would entitle the claimant to file suit in the event that his claim was not acted upon within the ten days. But a stronger reason, in my opinion, is that the claimant, having had notice of the death of the decedent, and of the place where, and of the person to whom, presentation of his claim should be made. would reasonably be put on notice and would be required to use reasonable diligence in ascertaining the present address of the administrator, in the event of his no longer being at the place designated in the notice. It should not be held, unless cogent reason therefor exists, that the administrator, after giving the notice, is without power to change his place of business from that designated in the notice, for the period of four or ten months, as the case may be. It better accords with the policy of the law, which looks throughout to the prompt administration of decedents' estates, that creditors, having once been duly notified, should take such further steps as would be reasonable, rather than that the administration of estates should be delayed and a new notice required to be given. This will be particularly true in this city for perhaps some years to come, as the disturbed condition of affairs will probably entail numerous successive changes of addresses before attorneys and their clients finally select their perma-

nent place of business. That a person interested in the estate may sometimes be put upon such inquiry, is indicated in the case of Tynan v. Kerns, 119 Cal. 447–451, 51 Pac. 693, where it is said:

"Constructive notice is such notice as is imputed by law (Civ. Code, sec. 18), as to the effect of which the court can judge, notwithstanding such notice is denied. We think that the actual notice which appellant had of the death of decedent, and the issuing of letters to respondent, administratrix, and the inventory, carried with it notice of circumstances sufficient to put appellant upon inquiry of the particular fact of which she complains, and she thus had 'constructive notice of the fact itself in all cases in which, by prosecuting such inquiry, she might have learned such fact': Civ. Code, sec. 19."

For the foregoing reasons, submitted by counsel for the executrix of the will of Justin Labarthe, it is ordered that she have a decree entered establishing that due notice has been given by her to the creditors of her testator's estate.

ESTATE OF ANNIE SYKES, DECEASED.

Probate Homestead—Court must Set Apart.—In a proper case the court must, on the application of a surviving husband, set apart a probate homestead; there is no discretion.

Albert H. Elliott, for applicant.

Frank R. Whitcomb, John C. Boyle, opposed.

COFFEY, J. Annie Sykes died February 26, 1899, leaving her surviving her husband, petitioner herein, and several children, all of whom have attained their majority. She left property described in the petition herein and returned in the inventory on file, appraised at the sum of $2,250. The property was the domicile of deceased and petitioner. Said property was the separate property of deceased. Furniture and other household goods in said domicile also belonged to said

deceased. There is no community property of petitioner and decedent. No homestead was declared on said property during the liftime of decedent, and petitioner has made no other application for a homestead herein.

The court must set apart a probate homestead and there is no discretion: Code Civ. Proc. 1465; Estate of Green, 1 Cof. Prob. Dec. 444; Estate of Tate, 1 Cof. Prob. Dec. 217; Estate of Ballentine, 45 Cal. 696; Estate of McCauley, 50 Cal. 546; Mawson v. Mawson, 50 Cal. 539; In re Lahiff, 86 Cal. 151, 24 Pac. 850.

IN THE MATTER OF ESTATE OF GEORGE DELAPORTE, DECEASED.

[No. 9041 (N. S.); November 16, 1911.]

Family Allowance—Notice.—An Amended Petition for a Family Allowance by one claiming to be widow of the deceased, in the administration of an estate, although within the spirit is not within the letter of section 1465a of the Code of Civil Procedure, referring to the giving of notice.

Amended petition for family allowance; demurrer by executrix.

Clarence A. Shuey, Andros & Hengstler and Golden W. Bell, for petitioner, Adele Brun Delaporte, claiming to be widow.

J. J. Dunne, for executrix demurrant, Helen Doherty.

Thomas E. Haven, for certain heirs.

COFFEY, J. If the petition herein be subject to the ordinary rules of pleading, it is at least doubtful if it could stand against demurrer. In the Mackay case, relied upon by petitioner, there was no demurrer; issue was joined upon the allegations made in the petition. There is no statutory provision for the framing of issues in such cases. Ordinarily, where there is no question of the status of the applicant,

such matters, are presented informally; but the lack of formality in pleading does not relieve the applicant from the burden of establishing her claim to recognition under the statute. While the petition may be framed in terms not strictly formal, yet it is traversable, and an order made thereupon is appealable. It is final if not appealed from in proper season. It is not reviewable thereafter; the power of the court over it is at end, for the court of first instance cannot act as an appellate court to review its own orders. It is conclusive as to the status of the person in whose favor it was made for all purposes connected with the order and payment of the money thereunder. In the Nolan Estate, 145 Cal. 559, 79 Pac. 428, this doctrine was declared, although it turned out that the woman who obtained the allowance and who had been appointed administratrix never was the wife or widow of decedent. This fact, was ascertained in a proceeding for partial distribution, in which it was determined that decedent left no widow, but that certain collateral kin were his only heirs, whereupon these heirs sought in the settlement of her account to charge the administratrix with the amount paid to her for family allowance on the assumption that she was the widow. It was held by the appellate court that there was no relief for the heirs, as the validity of the order could not be attacked collaterally. Of course it could be modified from time to time according to the change in condition or circumstances of the estate; and equally, of course, there must be proof of the applicant's right to a family allowance. Such proof was made in the Nolan case, and it was considered for that purpose conclusive; but upon distribution evidence was adduced which demonstrated that the pretensions of the alleged widow were unfounded and distribution was decreed to the collateral heirs; yet, nevertheless, they had no recourse for the amounts paid out or due upon the original order. While it may be that, as the widow is entitled to an allowance as a matter of right, no notice of the court's intention or action in the matter is required, nor a formal application absolutely necessary, yet judicial prudence dictates and experience teaches that the court should be cautious in passing upon such applications. The

necessity of such caution in procedure was shown not only in the Estate of Nolan, but also in the Estate of Maxwell, 1 Cof. Prob. Dec., 126 (see In re Maxwell, 74 Cal. 384, 16 Pac. 206), where orders were obtained upon premises afterward ascertained to be false; and the propriety of practice and procedure being carefully guarded was pointed out by Mr. Justice Temple in Kearney v. Kearney, 72 Cal. 597, 15 Pac. 769, suggesting that probate judges adopt a suitable mode of proceeding to avoid the grave questions that sometimes arise where action is taken without notice. Chief Justice Searles concurred in this suggestion, and it was afterward adopted and extended by this court to cover family allowances as well as homesteads: See Probate Rule 7, Superior Court. Subsequently the legislature enacted section 1465a of the Code of Civil Procedure, which careful practitioners apply to matters of family allowance as within the spirit of the rule.

While the strict rules of pleading may not be applicable here, under our statute, reason should seem to require that, where so important a question of fact is raised and a contest ensues, the petition should conform to the requirements of a complaint in a civil action; but the law, as it at present exists, is not so rigorous, and the court must accept the petition as presented.

Demurrer overruled.

IN THE MATTER OF THE ESTATE OF LIZZIE E. PRATT, DECEASED.

[No. 11,146 (N. S.); April 26, 1912.]

Will—Interpretation—Property Coming to Estate After Death.—If a testatrix by her will disposed of all the property she knew she owned to her three children, but not in uniform ratio, other property coming into the estate after her death but before final distribution should be distributed in equal shares according to the rules of succession, nowithstanding the spirit of the will.

Stoney, Rouleau & Stoney and Donzel Stoney, for Petitioner.

Orville C. Pratt, Jr., in propria persona, and Charles S. Wheeler and Nathan Moran, for heirs claiming under the statute of distribution.

COFFEY, J. On a petition for final distribution filed by the executrix, the question is presented whether certain property which has come into the estate is disposed of by the will, or whether as to it there is an intestacy, in which event it should be distributed to the heirs at law in accordance with the provisions of the Civil Code governing succession.

The will of the testatrix is holographic. With much detail and exactness it disposes of all the property shown by the inventory among the three surviving children of the decedent, who are also her sole heirs at law. The property so divided consists of one parcel of real property of the value of $6,600, and personal property appraised at $125,000, approximately. The will does not provide a uniform ratio of division among the recipients, the shares of each varying in accordance with the wishes of the testatrix as to the several items of property disposed of. That is to say, the parcel of land is given entire to one; the library to another; money, stocks and bonds are divided in one proportion, laces and jewelry in another, furniture in still another; and, in addition, there are specific bequests of particular articles. As to the property thus itemized, no question arises. With the exception of sufficient cash reserved in the hands of the executrix to pay the expenses of administration, it has been heretofore delivered to the legatees under decrees of partial distribution.

It further appears, however, that the testatrix, up to the time of her death, enjoyed a life estate in agricultural lands of considerable extent, which were rented by her to tenants "on shares," she receiving as rent stated proportions of the products of the soil of whatever the same might consist. Her death having occurred five months after the beginning of the crop year, the question arose with the remainderman as to whether the estate was entitled to any portion of the crop rents due at the next harvest season. A settlement was agreed upon, and has received the approval of the court, whereby the estate acquires its equitable proportion of these

rents. For the sake of convenience, and as a precaution against loss, the produce has been converted into money but for the purposes of the present consideration of the court, is to be regarded as being still subsisting as products of the soil.

The will contains no provision which is prima facie to be contrued as a general residuary clause. The executrix petitioning is one of the three heirs at law, as well as the principal legatee under the will. In her individual capacity she contends that the crop rents above mentioned come within and are disposed of by the following provision of the will: "I give, devise and bequeath all money, stocks and bonds I may have at the time of my death—after payment of debts, funeral expenses, testamentary obligations & for place of interment, as follows." Under the terms of the will, two-thirds of such money, stocks and bonds are to go to her daughter Marie, one-sixth to her daughter Lilian and one-sixth to her son Orville.

Specifically, the contention is that the word "money," used in the paragraph quoted, is to be construed as a residuary bequest of all personal property not otherwise disposed of by the will, basing this argument on the presumption against intestacy. In support of the contention, petitioner cites Estate of Miller, 48 Cal. 165, 22 Am. Rep. 422, in which case the word "money" used in a will was construed to include the residue of both personal and real property.

In that decision the supreme court found that the testator used the word "money" in its wider and popular sense, synonymous with "property" and "estate," and the court expressly took cognizance of the cardinal rule of construction, that in order to construe a gift of "money" in a will as including the general residue of personal or real property it must appear from the context and on the face of the will that such was the intention of the testator.

In order to arrive at the intention of the testatrix upon the question under consideration, the will should first be viewed as a whole: Estate of Clancy, 3 Cof. Prob. Dec. 343, 348. From the provisions of the will it is evident that the testatrix had a complete and exact conception of what constituted her property, aside from the particular asset here

under consideration. The instrument itself bears every internal evidence that the testatrix was possessed of the highest order of intelligence, and of much more than the ordinary skill in the use of words. It is but reasonable to conclude that the word "money" was not used by the testatrix in the loose and popular sense as synonymous with "property" or "estate," and that the crop rents in question are an asset contingent in character, and not in the contemplation of the testatrix at the time she executed her will: Hawkins' Construction of Wills, 49.

No decision upon the question at issue being deducible from the will as a whole, it will next be necessary to examine its provisions in detail in order to arrive at the intention of the testatrix. It is well settled that the law strongly favors the presumption against intestacy, whether the same be total or partial. Civil Code, section 1326, is declaratory of the law only so far as total intestacy is concerned, but it is not in derogation of the same principle as applied to total intestacy: Estate of O'Gorman, 161 Cal. 654, 120 Pac. 33. On the other hand, as a principle correlative to the above, it has been frequently affirmed that "if the intention of the testator with reference to a partial bequest or devise cannot be deduced from the face of the will, the bequest or devise fails, and there is a partial intestacy as to the subject matter thereof": Estate of Fay, 3 Cof. Prob. Dec. 270, 275; Estate of Young, 123 Cal. 341, 55 Pac. 1011; Estate of Doe, 1 Cof. Prob. Dec. 54, 66; Estate of Hale, 2 Cof. Prob. Dec. 191, 207 et seq.

According to Mr. Roper's systematic analysis of the construction of wills with respect to legacies, the first point to be considered is, the time to which the will refers in designating the property to be disposed of. The will under consideration proceeds as follows: "I give, devise and bequeath all money, stocks and bonds I may have at the time of my death . . . as follows." The testatrix did not have the crop rents here in question at the time of her death, which occurred on the twenty-ninth day of January, 1911. She did not even have at that time a right in praesenti to receive in futuro then existing property; the crops might never have matured or might have been embezzled by the tenant into

whose possession they would come at the time of severance, or they might have been destroyed by fire while in his possession, or a dozen other contingencies might have arisen whereby the testatrix, had she lived, or her representatives, might never have received them at all. This estate was, at most, a mere expectancy.

An analogous instance quoted by Mr. Roper is a bequest of ships and money which, at the time of testator's decease, should be due and owing to him. A contest arising in respect of freight money earned by the ship under charter-party and on a voyage which was uncompleted until after the testator's death, it was held that this money did not pass: 1 Roper on Legacies, *247, *249. Similarly as to a bequest of moneys "in hand" at the time of testator's death. Such a bequest will pass money in bank, or in the possession of testator's agent, but not money due on a mortgage debt, or rents, even though due but not collected prior to testator's decease: 1 Roper on Legacies, *283.

The limitation expressly attached by the testatrix to moneys "I may have at the time of my death," is a strong, if not a conclusive, ground for not construing "money" to include the residuary estate: Byron v. Brandreth, L. R. 19 Eq. 475.

The conclusion just indicated is verified by the context in which the bequest of money is found. The rule noscitur a sociis is particularly applicable to the construction of wills: Broom's Legal Maxims, 8th ed., 447–449. The fact that the testatrix coupled the bequest of money with that of stocks and bonds, forms of security most easily convertible into money, and most generally construed as passing under a bequest of money, plainly shows that she intended to use the word "money" in its strict sense. Under such circumstances, it will not receive the broader construction merely on the strength of even an expressed intention to dispose of the whole estate: 1 Jarman on Wills, *729.

It therefore appears, both upon examination of the will as a whole and from specific rules of construction which must be applied to it, that the crop rents under consideration should be distributed according to the laws of succession in

equal shares among the three heirs at law of the testatrix, as being property not contemplated by the testatrix at the time of making her will, and not disposed of by the provisions of the will.

Let it be decreed that the proceeds of the crop rents be distributed in accordance with the above conclusions, and in like manner as to all other property of the estate not now known or discovered, except such as would come strictly under the denomination of money, stocks and bonds.

ESTATE OF MARY A. CLUTE, DECEASED.

[No. 19,516; May 31, 1899.]

Administrator's Account—Trustee in Bankruptcy may Contest.—A trustee in bankruptcy of an heir has the right to contest an account of the administrator of the decedent.

Geo. W. Baker, for administrator.

P. L. Benjamin, in propriâ personâ, for contestant.

COFFEY, J. On the filing of the annual account of E. R. Clute, the administrator of the estate of the above-named decedent, P. L. Benjamin appeared as trustee in bankruptcy of the said E. R. Clute, and filed exceptions to the account. E. R. Clute, the said administrator, is also the sole heir of the decedent, and the said Benjamin, as said trustee in bankruptcy of the said E. R. Clute, claims the right to contest the account. The administrator denies the right of the said trustee in bankruptcy to contest the account, and objects to the said trustee being heard on the settlement of the account. The objection thus made presents the questions to be determined by the court.

The present bankruptcy act provides (section 70), that: "The trustee of the estate of a bankrupt, upon his appointment and qualification, shall be vested by operation of law with the title of the bankrupt, as of the day he was adjudged a bankrupt, except, in so far as it is to property which is

exempt, to all (5) property which prior to the filing of the petition he could by any means have transferred, or which might have been levied upon and sold under judicial process against him."

E. R. Clute, as sole heir, prior to the filing of his petition in bankruptcy was the absolute owner, subject to the purposes of administration of the estate of the decedent, of all the property, real or personal, left by the decedent, and has the absolute right to transfer said property, subject, of course, to the purposes of administration of the estate, and, as the trustee of the estate of a bankrupt, under the provision of the bankruptcy act quoted, is vested by operation of law with the title of bankrupt, as of the day he was adjudged a bankrupt (except in so far as it is to property which is exempt), to all property which, prior to the filing of the petition in bankruptcy, the bankrupt could by any means have transferred, it follows that the trustee in bankruptcy stands vested with all the right, title and interest in the property of the estate of the decedent held by the said bankrupt at the time of the filing of the petition in bankruptcy, and, as such trustee, occupies the same position as the said bankrupt, or rather as any assignee or vendee of the bankrupt would have occupied in the event of an assignment or transfer prior to the filing of the petition in bankruptcy.

The question to be determined, therefore, depends upon whether an assignee or vendee of an heir of a decedent has the right to appear and be heard in court, as such assignee or vendee, on the settlement of an account of the administrator of the estate.

The Code of Civil Procedure, sections 1626 and 1635, provides that when an account is filed by an executor or administrator, "any person interested in the estate" may appear and file his exceptions in writing to the account and contest the same; and the supreme court of this state, in Garwood v. Garwood, 29 Cal. 520, has said: "Doubtless, in a case like the present, which is to a certain extent a preliminary proceeding, the question rests very much in the discretion of the court, and any doubt as to the question of interest ought to be resolved in favor of the petitioner, and however remote

or contingent his interest may be, or, in other words, if he has the appearance of an interest, his right to contest ought not to be denied."

This court, in Estate of Love, 1 Cof. Prob. Dec. 537, held, quoting from the syllabus in the case, that: "A mortgagee of land inventoried in the estate under a mortgage made by the universal devisee and legatee of the testator is a party interested in the estate, and entitled to be heard upon the executor's accounts and on any distribution of the estate. Likewise, a judgment debtor of such universal devisee who has acquired, under execution upon the judgment, title to a parcel of realty inventoried in the estate is also a party interested in the estate; so, also, is a mortgage of such judgment debtor."

Under these authorities it is perfectly clear that a trustee in bankruptcy of an heir of a decedent has the right to contest an account of the administrator of the decedent.

The objections of the administrator are therefore overruled.

IN THE MATTER OF THE ESTATE OF GEORGE DELAPORTE, DECEASED.

[No. 9041; January 14, 1913.]

Marriage.—A Common-law Marriage, as Well as One Entered into under regular forms and ceremonies, does not create the relation of husband and wife between a man and a woman already having wife and a husband living and not divorced.

Application for family allowance by Adele Brun Delaporte, as widow of deceased.

Andros & Hengstler, Golden W. Bell and Clarence A. Shuey, for applicant.

Joseph J. Dunne, for Helen Doherty, executrix.

Thomas E. Haven, for certain legatees.

COFFEY, J. Petitioner asserts that about October, 1885, she and decedent mutually promised and agreed at the city of New York and in the state of that name, and then and there contracted to be joined in lawful wedlock in accordance with the laws of that state, and to be thereafter, to wit, on the sixteenth day of December, 1885, married according to the laws of that state and to continue thereafter for life in the personal relation of husband and wife, and to mutually sustain, bear and assume toward each other, and the world at large, until the death of either one of them, marital rights, duties and obligations as husband and wife.

Petitioner further asserts that on the said sixteenth day of December, 1885, in New York and under and by virtue of the laws of that state, the petitioner and decedent being then and there of age and competent to enter into marital relations, publicly and in the presence of witnesses then and there declared their said agreement to be and become from and after that time husband and wife, and were married in the presence of said witnesses, and by virtue of said ceremony and mutual agreement immediately thereafter assumed marital relations, and became and were husband and wife and were known as such in their business and social relations with the world, and from that time on and continuously for more than fourteen years petitioner and decedent resided, lived and cohabited together as husband and wife and mutually assumed, bore and sustained toward each other and the world at large that relation. It is further asserted that as such husband and wife they lived in such manner and were known to the world as Mr. and Mrs. George Delaporte in New York City from December 16, 1885, until about January 21, 1886, when they went to the city of Mexico, where they lived in like manner and were so known until about June, 1887; that thereafter they returned to the United States, and lived for a short time in New York City, in the house of the father and mother of decedent, and were by them treated as husband and wife; thence to Chicago, where they were so known until about February, 1888, in which month they removed to San Francisco where they were likewise known as husband and wife to all persons with whom they came in contact as husband

and wife under the name of Mr. and Mrs. George Delaporte until about 1897; that in this year, 1897, they removed to Berkeley, Alameda county, and lived and cohabited in said town as husband and wife under the said name until about 1900, and that the father of decedent lived in the house occupied by them as a member of their family for about eight months and that he treated and recognized petitioner as his daughter by marriage, and that at all times the sisters and brothers of decedent treated and addressed petitioner as sister and as the wife of decedent. She further asserted that during the period from December 16, 1885, petitioner faithfully performed all her marital duties and obligations, and contributed the greater part of the support of herself and decedent by diligent and successful application to her trade as a dressmaker. It is further asserted that before the said sixteenth day of December, 1885, and in consideration of the promise of said decedent to marry her, she advanced to him the money which enabled him to learn the trade which he thereafter pursued as his life occupation. It is asserted further that while living with him as husband and wife she conducted dressmaking parlors under the name of Madame Delaporte until about 1897, until she became totally incapacitated to practice her profession by reason of failure of eyesight and she became and is totally blind. Subsequently, about the year 1900, while living and cohabiting with decedent in Berkeley as his wife, petitioner asserts, she was abandoned and deserted by him, and thereafter he neglected and refused to contribute to her support and maintenance and thereby she was left wholly destitute. She asserts that said abandonment and desertion were without fault or justification on her part and she was always willing and desirous of performing her obligations and continuing her conjugal relations, and she claims, finally, that she was from the beginning in 1885 until the day of his death the lawful wife of decedent and entitled to call upon him for maintenance and support. There was no issue of this relation and petitioner therefore claims to be entitled to an allowance adequate to her situation and status and the circumstances of the estate.

The answer to this application comprises over fifteen pages typewritten and denies specifically every material allegation of the petition; and avers that on November 1, 1900, the petitioner, under the name of "Adele Brun," applied for administration to the "King's Daughters' Home for Incurables" in Oakland, and was admitted to that institution, and paid therefor five hundred dollars and ever since has been and is now therein. The application is annexed to the answer.

The respondent executrix for a further, separate, distinct and independent defense of this application, avers that at the time of the alleged contract of marriage between petitioner and decedent, to wit, the year 1885, the applicant then being in the city and state of New York, was wholly incompetent, incapable and without legal capacity to enter into marital relations with or to marry any person and in particular with the decedent; and respondent avers that during the whole of the year 1885, and more particularly on the sixteenth day of December of that year, she was the wife of one Claude Brun, to whom she was married in the month of October, 1864, in the Church of San Lorenzo, in the city of Rome, Italy, which marriage was never dissolved and still subsists, and that at the time of her asserted marriage to decedent she could not legally have contracted a union with decedent, because under the law both of Italy and New York such an alliance would be bigamous and void.

It is further answered that decedent himself was at the times, and during the period indicated, entirely incompetent to engage in a connubial contract because he was already a married man, the husband of one Marie Carbon, and that such relation was in full force, validity and effect at the time which petitioner claims she intermarried with decedent.

For a final answer to this application, respondent sets up an instrument in writing purporting to be a release of all obligations that she might have against decedent or his estate, which document was witnessed and acknowledged on September 25, 1900, and contains this declaration:

"I hereby solemnly declare and certify that I never was and am not now, in any manner or form, either married to or the wife of the aforesaid George Delaporte."

This document began: "I Adele Brun of the City of Oakland" and was subscribed "Adele Brun," and witnessed by J. H. Smith, W. C. Moran, Mrs. Anna Wright, Mrs. Minnie Juillerat, and acknowledged October 24, 1900, before W. C. Moran, notary public for Alameda county.

Concerning this document and its execution, criticism has been made because of her condition; she was in advanced age and blind, but she was not totally destitute of counsel, and if she had any claims upon the decedent she had opportunity of advice; and she was advised, as appears from the evidence; she had independent advice; it was at arms-length; it appears that she had her own attorney; but whether or not she was constrained by her circumstances to execute this release, which has all the formal appearance of freedom of action, this case is not dependent upon that instrument. Her own testimony is sufficient to estop her claim to an allowance; it is a conclusive admission which cannot be denied or controverted; when she entered into this alliance with decedent in 1885 in New York she was a woman of over forty years of age, no longer a maiden, but, according to her own statement, a married woman by a ceremony solemnized twenty-one years before in a church which recognized no dissolubility save by death and in a country which indulges no presumption of legal decease. The man himself was much her junior, nearly twenty years younger, but neither was competent to marry by the law of the land in which they were living, and each was under the statutes of the state, liable to prosecution for bigamy, if either attempted marriage. It is an impossible case. There is an absolute legal impossibility of marriage; it lacks the essential and indispensable ingredient of matrimony. The element of legal capacity must coexist with consent and connubiation; and there is no such element in this case, and, therefore, no right to a family allowance.

Application denied.

As to Common-law Marriages, see note in 3 Cof. Prob. Dec. 196.

IN THE MATTER OF THE ESTATE OF JAMES W. CUDWORTH, DECEASED.

[No. 20,137; April 30, 1900.]

Community or Separate Property.—A Declaration by a Testator in His Will that the property disposed of is his separate estate is not conclusive.

Knight & Heggerty and Charles J. Heggerty, for Royal Wallace Cudworth, adult son.

Henley & Costello and Barclay Henley, for Johanna Cudworth, widow.

A. N. Drown, for Gay Allender Rosenberg, executor.

COFFEY, J. James W. Cudworth died on the twelfth day of May, 1898, in San Francisco, where he had resided for virtually half a century. At the time of his death he was about seventy-three years of age and had lived with his family for a long period at 2018 Union street. His family consisted of his wife, Johanna Cudworth, and their two children, Royal Wallace Cudworth and Emory Ahlers Cudworth, aged, respectively, twenty and sixteen years at the date of his demise.

At the time of his death Cudworth owned several parcels of real estate in San Francisco, and also sundry stocks, mortgages, promissory notes, goods and chattels and cash money, and other personal property, of the total value, according to appraisement, of $138,325.35; real estate and improvements, $79,850.00, and personal property, $58,475.35.

On November 11, 1884, he made a will, a copy of which is here inserted with the codicil thereto dated May 11, 1893:

"WILL.

"I, James W. Cudworth, a resident of the City and County of San Francisco, State of California, being of the age of sixty (60) years and of sound and disposing memory, and acting without any menace, fraud, duress or undue influence do make, publish and declare this to be my Last Will and

Testament, hereby revoking all former wills by me at any time made;

"I. I direct that all my just debts, the expenses of my funeral and last illness, and the cost of purchasing and improving a suitable place for my burial, and also of a proper monument or stone to mark the place of my interment, be paid as soon after my decease as shall be practicable.

"II. I certify and declare that all the property of which I am now possessed, whether real or personal, was owned by me before my marriage with my present wife, or consists of, or has been purchased with, the rents, issues and profits of the property which I owned before such marriage; and that so it is all my separate property.

"III. The lot of land situated on the northerly side of Union Street, between Buchanan and Webster Streets, in the City and County of San Francisco, State aforesaid, having a frontage of sixty-eight (68) feet and nine (9) inches on Union Street, by a uniform depth Northerly of One hundred and thirty-seven (137) feet and six inches, together with the dwelling house thereon, and the appurtenances thereof, the same being the premises now occupied as the home of myself and my family, I give and devise and bequeath to my wife Johanna Cudworth, for and during the period of her natural life, or until she shall remarry, the same to be used during such period as a home for herself and my children and for the children of my said wife by her former marriage; upon her marrying again, or in case she shall not remarry, then upon her death, I give, devise, and bequeath the said property, and all thereof, unto my children Royal Wallace Cudworth and Emory Ahlers Cudworth, and to the survivor of them, in case both should not then be living, and to their heirs forever; Provided, However, that if, upon the remarriage or death of my wife, one of my said children shall be dead, but shall have left issue, then the issue of such deceased child shall take the share which its parent would have taken if living.

"IV. All the rest, residue and remainder of my estate, real and personal and wheresoever situated, I give, devise and bequeath unto my said children Royal Wallace Cud-

worth and Emory Ahlers Cudworth, the same to be divided equally between them, share and share alike; in case only one of my said children shall survive me, then I give, devise and bequeath to him, and to his heirs forever, all of the said rest, residue and remainder of my estate; Provided, However, that if the deceased child shall have left issue then surviving, the issue of such deceased child shall take the share which its parent would have taken, if living at the time of my decease.

"V. In case I die, leaving neither child nor issue of any deceased child, me surviving, then and in that case I give, devise and bequeath my estate as follows, viz., the equal one-third (⅓) part thereof to my said wife Johanna Cudworth, or in case she shall not survive me, to her descendants, to be divided among them equally, by right of representation and not per capita; the equal one-third (⅓) part thereof to the heirs of my deceased wife Olive Powers Cudworth; and the remaining one-third (⅓) part thereof, to my heirs at law, according to the law of succession of the State of California.

"VI. I nominate, constitute, and appoint my brother, A. W. Cudworth and my friend J. P. M. Perham, to be the executors of this my will; and I will and direct that no bonds or other security shall be required to be given by them, or on their behalf, either upon their appointment as such Executors, or upon the performance by them of any act relating to the administration of my estate: I also authorize and empower them, or such of them as shall qualify and act, to sell any and all property belonging to my estate, whether real or personal, at public or private sale, for cash or on credit, with or without notice, in such manner and upon such terms as to them shall seem best, and without applying to any Court, officer or tribunal for any order, permission, power or authority to do so; also to invest and reinvest, in such manner as to them shall seem proper, all proceeds of such sales and all moneys which may be in their hands derived from my estate, until the final settlement of the administration of the same.

"In testimony whereof, I have hereunto set my hand and seal at said City and County of San Francisco, this 11th day November, A. D. 1884.

"JAMES W. CUDWORTH. (Seal)

"Witnesses:

"A. N. DROWN, Residing at 1722 Vallejo Street, San Francisco, Cal.

"CYRUS W. CARMANY, Residing at No. 923 Jackson Street, San Francisco, Cal.

"The foregoing will written on this and the three preceding pages, was on this —— day of November, 1884, at the City and County of San Francisco, State of California, subscribed at the end thereof by James W. Cudworth, the testator therein named, in the presence of us, and of both of us; and the said testator thereupon, and at the time of so subscribing the same declared to us that said instrument is his will; we thereupon, then and there, at his request, and in his presence attested the execution thereof as witnesses, and each signed his name at the end of said will as a witness.

"San Francisco, November 11th, 1884.

"A. N. DROWN,

"Residing at 1722 Vallejo Street, San Francisco, Cal.

"CYRUS W. CARMANY,

"Residing at No. 923 Jackson Street, San Francisco, Cal.

"CODICIL.

"Inasmuch as J. P. M. Perham, one of the Executors named in the foregoing will has died since the execution thereof, I hereby nominate and appoint in his stead as co-executor thereof with my brother A. W. Cudworth, Gay Allender Rosenberg, of the City and County of San Francisco and do make the same provision concerning the giving of bonds by him and do confer upon him the same power and authority, as in said will is provided concerning said Perham and said A. W. Cudworth.

"As thus remodified I republish said Will and declare the same to be my Last Will and Testament.

"In Witness whereof I have hereunto set my hand and affixed my seal at San Francisco in the State of California

this eleventh day of May, A. D. 1893 in the presence of two witnesses.

"JAMES W. CUDWORTH. (Seal)

"Witnesses:

"A. N. DROWN, Residing in San Francisco, Cal.

"J. F. LEICESTER, Residing at San Francisco, Cal."

These instruments were drawn by one of the subscribing witnesses, Mr. Albert N. Drown, a practicing lawyer in this city and county for more than thirty years, who testified at the time of probate that the testator was at the dates of the will and codicil, and for many years next prior to the death of decedent had been his client and was well known to him.

Mr. Drown testified that the documents were in his handwriting and were prepared by him at the request of testator, and in accordance with his instructions and wishes.

On the second day of June, 1898, these papers were admitted to probate and letters testamentary thereupon were issued to Gay Allender Rosenburg, the person named in the codicil, who was also the son-in-law of the widow of the testator, having been married to one of the two daughters by her former marriage, to which allusion is made in the third clause of the will. Cudworth himself had been married twice, as appears by the fifth clause, but there was no issue of that union, and on September 13, 1876, he intermarried with Johanna, with the result of the birth of the two boys. Royal and Emory.

The petition for probate of will was by A. W. Cudworth and G. A. Rosenberg, the executors named therein; A. W. Cudworth subsequently renounced right to letters and Rosenberg thus became sole executor.

The usual proceedings in probate administration were then had including the making and return to the court of "a full, true and correct, inventory and appraisement of all of the estate of said decedent" by the executor on July 15, 1898, in which it is recited that "all and singular the property and estate mentioned or described in the foregoing inventory was claimed by said James W. Cudworth to be his separate property: and all of the same was, as far as can be ascertained by said executor, the separate property of said decedent."

The same executor in his report accompanying final account and petition for settlement and for final distribution makes the following recital.

"That at the date of the death of said decedent, and long prior thereto, the said decedent and said Johanna Cudworth were married and were husband and wife, and living and cohabiting together as such; that, as your petitioner is informed and believes, and so states, a large part of the property and estate of which said decedent died seised or possessed was acquired during the marriage of said Johanna Cudworth and said decedent, and whilst they were husband and wife, and was the community property of said decedent and said Johanna Cudworth; but that your petitioner is unable to ascertain or determine just what proportion, or how much, of the property belonging to said decedent or his said estate was or is such community property."

The attorney of record for the executor is the same gentleman who drew the will, as testified to by him, and who drew and signed as such attorney the petition for distribution, and whose careful and accurate conduct as attorney is manifest in all his work.

The widow applied for a homestead July 20, 1898, selecting the same parcel of property described in the third clause of the will and therein devised to her for life or until remarriage as a home for herself and her children by both marriages. This was and had been the home and homestead of decedent and family for many years, although not made such by statutory selection during his lifetime; but the widow applied to the court to set apart the same as a homestead for her use and that of the minor children of deceased "out of the real estate belonging to the decedent, as the said testator, in his last will and testament, declared the entire property owned by him to be his separate estate," and on August 4, 1898, her petition was granted and the homestead set apart. Her attorneys were Chickering, Thomas & Gregory.

Now comes the widow and claims that the entire estate was community property, although her husband expressly and solemnly declared in his will, drawn by and under the advice of the able counsel who had been for years his attorney

and who is and has been continuously the adviser of the executor, that all of his property was his separate estate, and disposed of it as such, a life estate being given to the widow in the real property comprising the family home, remainder equally to the two sons.

No matter how express and solemn this declaration may be in form nor how well advised it may be presumed to have been, it does not of itself establish the fact.

Under the advice of the same attorney the executor states in his petition for distribution that a large part of the property and estate was acquired during the marriage of James and Johanna, and was community property; but he is unable to ascertain how much, and leaves that difficulty to be determined by the court.

All of the property belongs to the community unless it can be shown to have been acquired in the way prescribed by the statute for the acquisition of separate property. The evidence shows that the decedent testator owned at the time of his marriage all of the real estate of which he died seised. There were no improvements of consequence on the real estate at the time of decedent's marriage with his second spouse; and I think that the testimony establishes that the subsequent improvements were made with decedent's own money. The real estate and improvements are, therefore, to be considered separate property.

As to the personal property described in the inventory and appraisement, it was all acquired during the community by purchase, and must, in the absence of clear and convincing evidence to the contrary, be held to be community property. In default of proof of such degree the presumption becomes absolute and conclusive.

Although counsel for Royal Wallace Cudworth has presented a most elaborate and ingenious array of figures to support the deduction that it all came from decedent's funds, I think the evidence is too obscure to warrant such conclusion as to the personal property.

The money invested in the personal property cannot be said to have been traced by plain and connected channels to the separate estate of decedent. None of this personalty

was acquired prior to the marriage, and there is no satisfactory proof that it was the product of the proceeds of the sales of property which decedent possessed prior to his second marriage.

This Case was Before the supreme court in 133 Cal. 469, 65 Pac. 104.

As to what is Community Property, see note in 4 Cof. Prob. Dec. 42.

IN THE MATTER OF THE ESTATE OF CALVIN PAIGE, DECEASED.

[No. 7783 (N. S.); April 28, 1910.]

Inheritance Tax—Nature and Effect.—The inheritance tax is not a tax in the ordinary sense of the word, but is a charge imposed by law for the privilege of inheriting or taking by will; since this is a right only by statutory enactment and is entirely under the control of the legislature.

Inheritance Tax—Right of Legislature to Impose.—Each state has the right, unless prohibited by its constitution, to make a charge for the privilege of receiving by will or by inheritance any property within its borders.

Inheritance Tax—Situs of Corporate Stock.—While for most purposes a chose in action adheres to the person of its owner, for the purpose of administration it does not. For such purpose the situs is where the debtor resides. Stocks of California corporations constitute property of a decedent actually in this state.

Hartley F. Peart and Earl H. Pier, for treasurer.

Charles S. Wheeler and Nathan M. Moran, for executors.

John M. Burnett, inheritance tax appraiser.

COFFEY, J. Calvin Paige died on the nineteenth day of March, 1909, in the city of New York, state of New York. He left a last will and testament which was duly proved and allowed and admitted to probate in the surrogate's court of the county of New York, and letters testamentary thereon were is-

sued to Louis F. Monteagle, Timothy Paige and George M. Wright, named in said will as executors thereof, who qualified and entered upon the discharge of the duties of their trust in New York.

Louis F. Monteagle, Timothy Paige and George M. Wright produced and filed in this court a copy of said will and the probate thereof, duly authenticated by the said surrogate's court. Thereafter, on due proceedings had, this court by its order given and made on the twenty-fifth day of May, 1909, admitted said will to probate, and letters testamentary were duly issued to said Monteagle, Paige and Wright, and on said last named day they duly qualified as such executors in the state of California, and entered upon the discharge of the duties of their trust.

Calvin Paige was a resident of, and actually domiciled in, the city and county and state of New York, at the time of his death.

Testator, by his last will and testament, bequeathed legacies in money to divers legatees, which said legacies amount to the sum of five hundred and seventy-five thousand ($575,000) in the aggregate, and then devised and bequeathed the rest and residue of his estate to his niece, Lydia Paige Monteagle, and his nephew, Timothy Paige, in equal shares.

Testator left a large estate in the state of New York, under the jurisdiction of the said surrogate's court. Said estate exceeds the sum of six millions of dollars in value; the administration of said estate in New York has not been closed, and all the money legacies will be paid through the said surrogate's court in New York. All the estate of said testator in California will go to said Lydia Paige Monteagle and Timothy Paige, under the residuary clause in said will.

The estate of said decedent within the state of California and the value thereof at the time of his death were as follows:

Estate.	Bonds of Corporations.	Value.
10	Bay Counties Power Co. first mortgage....	$10,200.00
5	Bay Counties Power Co. second mortgage...	5,000.00
65	California Gas & Elec. etc., mortgage.....	63,700.00
20	Colusa and Lake R. R.....	20,000.00
44	Contra Costa Water Co. issue of 1894.....	44,880.00

50	Contra Costa Water Co. general mortgage..	45,000.00
40	First Federal Trust Co. first mortgage....	40,000.00
75	Los Angeles R. R. Co. first mortgage.....	81,750.00
5	Oakland Gas L. & H. Co. mortgage.....	5,150.00
10	Oakland Transit Co. first cons.....	11,300.00
20	Oakland Transit Co. consolidated mortgage.	20,600.00
5	Oceanic Steamship Co. first mortgage.....	2,500.00
25	Oakland Traction Co. general cons.....	33,250.00
20	Pacific Tel. & Tel. Co. first mortgage.....	20,000.00
10	Petaluma & Santa Rosa Ry. Co.....	9,500.00
114	Pacific Gas & Electric Co. general mortgage	108,370.00
50	People's Water Co. general mortgage.....	35,000.00
10	Pacific Light and Power Co. first mortgage..	10,200.00
10	S. F. Oak. & San Jose Ry. Co. first mortgage	10,600.00
10	Spring Valley Water Co. general mortgage.	9,000.00
9	San Francisco and North Pac. Ry. general mortgage	9,540.00
20	Sunset Tel. & Tel. Co. general mortgage....	10,500.00
50	S. F. Gas & Electric Co. general mortgage..	45,000.00
10	S. F. & San Joaquin V. Ry. first mortgage..	11,500.00
15	United Gas & Elec. Co. first mortgage.....	14,850.00
55	Valley Counties Power Co. first mortgage..	54,450.00
	Total value bonds.....	$731,840.00

STOCKS OF CORPORATIONS.

200	shares American Bank of San Francisco...	$26,000.00
132	shares Bank of Willows.....	23,100.00
65	shares Bank of America (Los Angeles), no value	———
407	shares Colusa Co. Bank.....	52,910.00
50	shares Cedar River Co., no value.....	———
4	shares Colusa and Lake Co. R. R. Co.....	40.00
170	shares Cal. Horse S. Co., no value.....	———
75	shares Ely Bond & M. Co., no value.....	———
33	shares National Bank of Stockton.....	6,600.00
582	shares First National Bank of San Francisco	145,500.00
1500	shares Giant Powder Co. cons.....	111,000.00
335	shares Humboldt Co. Bank (Eureka).....	15,225.00
50	shares Home Savings Bank (Eureka).....	3,500.00

75	shares Meadow Valley Ex. M. Co., no value.	———
100	shares Pioche West Ex. M. Co., no value....	———
801	Pacific T. & T. Co. (preferred).....	74,493.00
801	shares Pacific T. & T. Co. (common).....	19,224.00
71	shares Pacific Gas & E. Co.....	6,887.00
644	shares Risdon Iron, etc., Works.....	12,880.00
145	shares Security Savings Bank.....	47,125.00
1100	shares S. Feather R. W., etc., Co.....	500.00
150	shares Spring Mountain M. Co., no value...	———
4325	shares San Joaquin & R. R. etc. Co.....	17,292.00
8	shares Seaboard Bank.....	800.00
600	shares Spring Valley M., etc., Co., no value.	———
2650	shares Spring Valley Water Co.....	87,450.00
250	Wells Fargo Nev. Bank.....	49,000.00
	Total value stocks.....	$729,526.00

Notes.	Value.
Analy Savings Bank (Sebastopol).....	$20,000.00
Contra Costa Water Co.....	50,000.00
Cal. Wine Association.....	20,000.00
San Francisco Gas & E. Co.....	50,000.00
Santa Rosa Natl. Bank (bal.).....	8,000.00
James A. White.....	500.00
James Treadwell ($27,041.66) no value.....	———
Total value notes	$148,500.00
Due from Colusa County Bank on loan.....	30,000.00
Cash on deposit in banks in the city and County of San Francisco, State of California, at death..	49,330.77

All of the foregoing mentioned bonds, stocks and notes were, at the death of the testator, in the city and county of San Francisco, state of California, in a safe deposit box rented by the decedent, and were taken by the executors in California into their possession after his death. All of said notes, except that of James A. White and James Treadwell have been collected by the executors since their qualification, and the loan of $30,000 to the Colusa County Bank has also been collected by them.

All the corporations hereinbefore mentioned, the bonds, stocks and notes of which are hereinbefore set forth, are corporations duly organized and existing under the laws of the state of California.

RECAPITULATION OF VALUE OF ESTATE.

Value of bonds	$731,840.00
Value of stocks	729,526.00
Value of notes	148,500.00
Value of loan to Contra Costa Co. Bank	30,000.00
Cash in bank at death	49,330.77
Total value of estate in California	$1,689,196.77

The most important question in this proceeding is whether the state of California is entitled to any inheritance tax whatever on the property of the decedent which will be distributed by this court. For convenience it may be well to summarize the facts bearing on the question.

Calvin Paige died while a resident of, and domiciled in, the city and county and state of New York. His will, which was executed in New York was admitted to probate by the proper court in the county of his residence and domicile, and letters testamentary were duly issued to the executors named in the will. An exemplified copy of the will was duly admitted to probate and letters testamentary issued to the same executors.

Mr. Paige left a large amount of personal property consisting of bonds, stocks and notes of corporations organized and existing under the laws of California (designated herein as California corporations), a loan due from a California corporation, money in banks in San Francisco, and notes of individuals, made in California by residents of this State. These bonds, stocks, and notes were, at the death of Mr. Paige, in a safe deposit box in San Francisco, rented by him, and under his control, either personally or through his agent here, and have never been physically out of the state. The entire property was taken into possession by the executors under their appointment by this court, and the letters issued to them here. The notes (with two exceptions) and the loan have been collected by them in this state.

It will be observed that the inheritance tax is not a tax in the ordinary sense, but is a charge imposed by law for the privilege or inheriting or taking by will: In re Wilmerding, 117 Cal. 285.

And it will be observed also that the right of inheritance, or to take under a will, is a matter of statutory enactment, and entirely within the control of the legislature. Each state has the right, unless prohibited by its constitution, to make a charge for the privilege of receiving by will or by inheritance any property within its borders: State v. Dalrymple, 70 Md. 295, 17 Atl. 82, 3 L. R. A. 372; Callahan v. Woodbridge, 171 Mass. 595, 51 N. E. 176.

It will be noted that the administration of the estate of Mr. Paige in this state, though called ancillary for the purpose of distinguishing it from the administration of the last residence, namely, New York, is wholly independent of it. Our law provides for the administration of the estates of all nonresidents who have left property here, real or personal: Murphy v. Crouse, 135 Cal. 19, 87 Am. St. Rep. 90, 66 Pac. 971.

Section 1 of the inheritance tax law provides: "All property which shall pass by will or by the intestate laws of this state from any person who may die seised or possessed of the same while a resident of this state, or if such decedent was not a resident of this state at the time of his death, which property, or any part thereof, shall be within this state, . . . shall be, and is subject to a tax hereinafter provided for," etc.

That the property to be distributed by this court passes under the will of Mr. Paige is clear. That this court has jurisdiction of the estate here is beyond question, and that the California executors appointed by it are to administer the estate under its directions, is settled by Murphy v. Crouse, supra. It follows that the legatees derived their title to the property in California by virtue of the decree of distribution made by this court.

Then only remains the question whether this property was "within this state" at the death of the testator.

The language of section 1 of the inheritance tax law is general and sweeping. "All property" is comprehensive. No exception is made of real or personal property belonging to a

nonresident decedent. Certain exemptions are made in section 4 of the law, but as they do not include personal property of nonresident decedents the conclusion would be, on well-settled principles of construction, that it was the intention of the legislature that such propery is subject to the tax. On the face of the statute it seems that the tax in this proceeding is due, were it not for the maxim of "mobilia personam sequuntur."

Universal succession is the artificial continuation of a deceased person by an executor, heir or the like, as far as the succession to rights and obligations is concerned. It is a fiction, which gives whatever meaning it has to the saying "mobilia sequuntur personam," but being a fiction, it must not obscure the facts, when the facts become important, and its recognition is limited by the policy of the local law: Blackstone v. Miller, 188 U. S. 204, 47 L. Ed. 439, 23 Sup. Ct. Rep. 277.

The old rule expressed in this maxim is yielding more and more to the lex situs, and where justice requires that the actual situs of the thing should be examined, the fiction yields: Pullman P. Car etc. v. Pennsylvania, 141 U. S. 22, 35 L. Ed. 613.

When logic and the policy of the law of the state conflict with a fiction (mobilia, etc.) due to historical tradition, the fiction must yield: Blackstone v. Miller, 188 U. S. 206, 47 L. Ed. 439, 23 Sup. Ct. Rep. 277.

The reason given in the cases why the state can impose a succession tax on personal property within its borders, irrespective of the residence of the owner, is that the property is protected by the law of the state; that the state gives the right to receive it, and the state can impose a charge on it in return.

The persons claiming right to succession to property in Massachusetts under nonresident owners must hold their rights subject to the prior right of the state "to have the property administered here, in order that taxes may be paid upon the succession": Greves v. Shaw, 173 Mass. 210, 53 N. E. 372.

So here, the prior right of the state of California "to have the property administered here in order that taxes may be paid upon this succession" must prevail over the fiction.

It is held in Murphy v. Crouse, supra, that while for most purposes a chose in action adheres to the person of the owner, that for the purpose of administration that is not true. For such purpose the situs is where the debtor resides. Stocks of California corporations constitute property of a decedent actually in this state. Therefore, the stocks, bonds and notes in this state, owned by Mr. Paige, have their situs in California. The fiction must yield to the facts and the law.

In State v. Dalrymple, 70 Md. 294, 17 Atl. 82, 3 L. R. A. 372, it was held that personal property in Maryland belonging to the estate of William H. Dalrymple, a resident of California, was taxable. (The will of the decedent was in controversy in Estate of Dalrymple, 67 Cal. 444, 7 Pac. 906.)

The statute of New York is like ours, and under it it was held that money in banks in New York belonging to a nonresident decedent were taxable: Matter of Houdayer, 150 N. Y. 37, 55 Am. St. Rep. 642, 44 N. E. 718, 34 L. R. A. 235.

In Blackstone v. Miller, 188 U. S. 189, 47 L. Ed. 439, 23 Sup. Ct. Rep. 277, it was held (affirming the decision of the court of appeals of New York) that personal property in New York belonging to a deceased nonresident was taxable.

In the Matter of Whiting, 150 N. Y. 27, 55 Am. St. Rep. 640, 44 N. E. 715, 34 L. R. A. 232, it was held that stocks of New York corporations belonging to a deceased nonresident were taxable.

In Callaghan v. Woodbridge, 171 Mass. 595, 51 N. E. 176, and in Greves v. Shaw, 173 Mass. 205, 53 N. E. 372, and in Moody v. Shaw, 173 Mass. 375, 53 N. E. 891, it was held that personal property belonging to a deceased nonresident was subject to the tax.

Perhaps the pioneer case in this country on the point was decided in 1854. The supreme court of North Carolina held that personal property belonging to a deceased nonresident was taxable under the inheritance law then in force in that State: Alvany v. Powell, 2 Jones Eq. (55 N. C.) 51.

In the North Carolina case, the court, through Mr. Justice Richmond Munford Pearson, afterward Chief Justice, delivered a learned and luminous exposition of the law. The author of that opinion is described as a lawyer in the best sense

of the word who possessed an analytical mind that enabled him to grasp the salient points in a discussion without touching those extraneous matters which are necessarily present in all legal controversies. He was always guided by logic and reason in solving intricate questions. His logic was faultless and the principles he announced were so clear and well-defined that the members of the bar not only understood the law as he wrote it, but were fully convinced by his manner of statement that his conclusions were correct. These characteristics give value to the clear-cut views which we herein quote from Justice Pearson's opinion.

"After devoting to the question much consideration, we are satisfied that the true principle, both in regard to personal and real estate, is the situs of the property; and that the principle by which a distinction is made between personal and real estate, so that in regard to the former, a construction depending upon the domicile of the owner is adopted, is based upon a fiction, which has no application to 'questions of revenue.' The construction which adopts the situs of the property is first suggested to the mind, and is yielded to at once, because it is based upon a fact; the property is here, it is protected and passes by force of our laws. The construction which adopts the domicile does not suggest itself, and the mind will not entertain it, except after a long argumentation and much ingenious and refined reasoning; because it is based upon a fiction. . . .

"The principle of the domicile, which is based on the fiction that personal property attends the person, and is to be considered as being where the owner has his domicile, is adopted by the comity of nations in reference to the distribution of the personal estate of deceased persons; but it has no application where the rights of creditors are concerned: Story's Conflict of Laws, 354; Moye v. May, 8 Ir. Eq. 43 (N. C.) 131. . . .

"The notion upon which the principle of the domicile is based, that personal property attends the person and is where the owner lives, is a mere fiction, and its very restricted application rests upon the comity of nations; but in collecting debts and taxes, we must proceed upon the fact, and consider

the property as being where it actually is; in other words, the situs of the property must be the governing principle. . . .

"As the property situated here, belonging to a nonresident foreigner, is, after his death, protected and administered by our laws, there is the same reason for enforcing a tax upon it, as upon the property of our own citizens, in similar circumstances, and the statute should be so construed as to include both."

The policy of the law is (as was said of the New York law in the Matter of Whiting, supra) to tax all property passing by will or the intestate laws of the state, except as far as certain exceptions are made in the law itself. As the stocks bonds and notes were all physically present in the state of California at the time of the death of Mr. Paige; as the stocks, bonds and most of the notes were issued by corporations created by and continuing their existence under the laws of this state and their business and property are "within this state"; as the claims held by decedent here were against debtors residing in this state, as the title of the legatees to the property can only be established by a decree of the courts of this state, and the right to take under the will is given by the laws of this state, the fiction of mobilia personam sequuntur must yield to these facts and the policy of our local law.

It is to be regretted that in cases of this kind an inheritance tax may be imposed on the same property passing under the will or by the intestate laws, by two states, as was said in 188 U. S. 205, 47 L. Ed. 445. 23 Sup. Ct. Rep. 277; but however that may be, the state of California cannot be deprived of her rights by the action of any other state.

The conclusion of the appraiser that the personal property now being administered in this state is liable to the inheritance tax is confirmed by the court.

The Principle Discussed and Applied in the foregoing case was decided in the Estate of J. M. Douglass, Deceased, November 30, 1904, where an attempt was made by the executors to wrest jurisdiction over the subject matter from this court. For a history of the proceedings that resulted in the collection of the inheritance tax in that case see Estate of Douglass, 4 Cof. Prob. Dec. 345.

As to the Situs of Corporate Stock for purposes of inheritance taxation, see Ross on Inheritance Taxation, pp. 246–257.

ESTATE OF PATRICK MENIHAN, DECEASED.

[No. 15,282; May 12, 1915.]

Husband and Wife—Contract Between for Settlement of Property Rights.—Where husband and wife, she having instituted an action for divorce and they having subsequently arrived at an adjustment of their differences both as to their properties and their domestic affairs, enter into an agreement whereby they adjust their property rights and thereafter live together without any change in their matrimonial relations, the contract is valid under section 158 of the Civil Code. Such an agreement is a settlement of property rights, not a contract for separation, and the decisions on separation agreements are therefore not absolute authority. The agreement is not invalidated by a provision that the wife will make no claims upon the husband for her support.

Application for settlement of final account and distribution.

J. R. Leppo and Charles W. Lynch, for Michael Menihan, as executor and individually.

William A. Kelly, for widow, Margaret Menihan.

WHAT THE RECORD SHOWS.

COFFEY, J. The record shows that Patrick Menihan died intestate in San Francisco on March 6, 1913. By his will he nominated his wife Margaret and his brother Michael executrix and executor. His wife declined to petition or join with Michael in the application for probate, and the brother was appointed by the court in due season and entered upon the discharge of his duties, and continued in the customary routine of administration until May 28, 1914, when, as such executor, he filed his first and final account with a petition for its settlement and the distribution of the residue of the estate according to the terms of the will, alleging that the entire estate as inventoried and appraised was the separate property of the decedent.

On September 25, 1914, the widow filed objections to the account, alleging that the executor had failed to charge himself with the sum of $6,322.15 and interest, collected by him

from the German Savings Bank, claimed by the widow as community property.

In addition to this objection, the widow filed on the same day an opposition to the distribution on the ground that all of the estate left by decedent was community property, and asking that one-half thereof be distributed to her under the statute in such case made and provided.

On September 29, 1914, Michael Menihan, as executor and individually, filed an answer denying this claim and averring the contrary, and, as a separate defense and a bar to the widow's claim, set forth and pleaded a written agreement between her and the decedent executed on January 23, 1901, adjusting and determining their property rights.

THE PRINCIPAL QUESTION BEFORE THE COURT.

It is agreed that the principal question before the court on this hearing is to determine the force and effect to be given the contract entered into between Patrick Menihan and Margaret Menihan, husband and wife, on January 23, 1901.

In order to present this question fully this contract is here inserted:

"MEMORANDUM OF AGREEMENT.

"Made this 23d day of January, A. D. 1901, between Patrick Menihan, of the City and County of San Francisco, State of California, party of the first part, and Margaret Menihan, his wife, of the same place, party of the second part, Witnesseth: That,

"Whereas, unhappy differences have arisen between the parties hereto recently, and an action was brought by the party of the second part, in the Superior Court of the City and County of San Francisco, State of California, against the party of the first part, praying for a decree of divorce and certain other relief, including a reconveyance to her from the party of the first part, defendant in said action, of certain property in said complaint described, and for certain other relief, including alimony and the sum of seventy-five dollars ($75.00) per month during the pendency of the suit, and a reasonable amount, to be fixed by the Court, as and for costs and counsel fees and for an accounting and division of the community property; and,

"Whereas, the parties to said action and to this agreement, being desirous of avoiding further litigation and the necessity of a divorce, have arrived at a settlement of their differences, both as to their domestic affairs and their properties, as hereinafter provided:

"Now, therefore, it is stipulated and agreed by and between the parties hereto that the party of the first part will execute and deliver unto the party of the second part a deed of gift of that certain lot situated on Howard street, in the City and County of San Francisco, and referred to in said complaint, and the same shall be and remain her separate property and estate.

"In order that there may be no further claims by either party to this agreement against the other in regard to property matters, it is understood and agreed by and between them that all the property owned by the party of the second part at the time of the marriage of the parties hereto, to wit, on or about the 25th day of January, 1885, shall be and remain her separate property and estate, to be disposed of by her as she may see fit.

"It is further understood and agreed by and between the parties hereto that the party of the second part, upon the execution of this agreement, will dismiss the said action brought in the said Superior Court of the City and County of San Francisco and release the injunction obtained against the defendant in said action, the party of the first part hereto, restraining him from withdrawing moneys from certain banks in said injunction specified, in the City and County of San Francisco, and also discharge the lis pendens filed in said action.

"It is further understood and agreed by and between the parties hereto that the party of the second part releases all claim against the party of the first part to any interest in the community property, or any property now held by the party of the first part, Patrick Menihan, or hereafter to be acquired by him, and relinquishes all claim to any portion of his estate, either community or separate, as an heir, in the event of his death before her death.

"It is further understood and agreed that the party of the first part relinquishes all claim against the party of the second part to any of her property which she owned at the time of the marriage of the parties hereto, or which she now owns or may hereafter acquire, as an heir or otherwise, it being expressly understood and agreed by and between the parties hereto that each shall have, and it is stipulated that each shall have, the absolute power of disposition of the property now held and possessed by them respectively, and that neither will claim any interest in said property during the lifetime of the other, or upon the death of the other, unless such interest shall be given by the voluntary will and testament of the other.

"It is further understood and agreed that the party of the second part will make no claim upon the party of the first part for her support.

"In witness whereof, the parties hereto have hereunto set their hands and seals the day and year first above written.

"PATRICK MENIHAN. (Seal)
"MARGARET MENIHAN. (Seal)"

RELATION OF PARTIES PRIOR TO CONTRACT.

A brief statement of the relations of the parties prior to the execution of this instrument may be useful in the case.

Patrick Menihan and Margaret Pickett, widow of Michael Pickett, intermarried on the twenty-fifth day of January, 1885.

Patrick was a police officer at that time and continued in active service until December 7, 1899, when he was retired on a pension, his salary being one hundred dollars per month. He was not thereafter in any employment. Aside from his income he appears to have had no property of consequence when he married. One witness, an intimate friend, John McAuliffe, testified that decedent had some shares of mining stock ten days before his marriage. This witness was also a speculator on a small scale in stocks; but it does not appear that the ventures of either yielded a profit; indeed, it must have been otherwise, for McAuliffe says he held similar shares "to his sorrow." Decedent borrowed forty dollars from this witness on this occasion to pay assessments on this stock. He always told witness that he had no money and he had to carry

those stocks; so it may be deduced that this item was and is negligible or intangible.

At the time of the marriage to Menihan the widow Pickett was conducting a lodging-house on Howard street in a house acquired by her as part of her former husband's estate, one-half of which, however, was claimed by that husband's mother, he having owned the property prior to marriage. Decedent was one of her lodgers and was such at the time of their marriage.

On the eve of that event she deeded to Patrick her interest in this property, although it does not appear affirmatively that any cash passed to her, and it is shown by McAuliffe's evidence that Patrick was short of money.

It is contended that the grant presumed a sufficient consideration, and that in any event, it being in his name, it was his separate property.

In 1888 Mrs. Menihan acquired the other half interest in the Howard street property by purchase from her first husband's mother in settlement of litigation over it, to pay which she borrowed six thousand dollars from the German Bank, and she kept the property until decedent deeded back to her what she conveyed to him on the eve of their marriage. Then she had a clear title to the whole.

This occurred about sixteen years after the marriage to Menihan. After she acquired in this manner the title to the entire Howard street property, she sold it for twelve thousand five hundred dollars and bought other property on Seventeenth street. She was then living on Clementina street, on other property of her own, with decedent, but moved to Seventeenth street and they were there at the time of the fire, and, after the fire, she rebuilt on Seventeenth street, and thence on she and decedent continued to live at that place. She rebuilt with the proceeds of the insurance on Clementina street and Seventeenth street properties. She was short one thousand dollars on the rebuilding contract and Patrick did not want her to raise a mortgage, and he gave her that amount. She did not consider it a loan; he gave it to her. McAuliffe testified that Menihan told him that he made her a present of it; that he gave her that thousand dollars to save her from

raising a mortgage. He never claimed that it was intended as a loan.

"In his will, however, Patrick declares that in the year 1907 he loaned to his wife one thousand dollars which had never been repaid him and he said he wished her to have a life interest in that sum."

This declaration is made in the third clause of his will, which is here inserted:

"I declare that in the year 1907 I loaned to my wife, Margaret Menihan, the sum of one thousand ($1000.00) dollars, which said sum of one thousand ($1000.00) dollars has never been repaid me, and it is my wish that she shall have a life estate in the said sum of one thousand ($1000.00) dollars and in an additional sum of two thousand ($2,000.00) dollars from my said estate during the time of her natural life, and the remainder, if any, at the time of her death, shall go to my nephew, John Menihan, of Cloverdale, County of Sonoma, State of California. The foregoing bequest to my said wife, Margaret Menihan, to be in full for any and all claims for family allowance or support which she may have against my said estate."

As to Patrick's part in the establishment of the estate, it is calculated that in his employment as a policeman from the time of his marriage, January 25, 1885, to December 7, 1899, his salary aggregated more than seventeen thousand eight hundred dollars, and, it is argued, his earnings were undoubtedly invested and produced income, so that on January 3, 1901, when his wife brought suit for divorce, her statement in her verified complaint that her husband was then worth twenty-five thousand dollars, from his earnings and accumulations, was approximately accurate.

This is in evidence, and the widow, in her testimony, has reiterated its correctness.

This seems to have been the situation of the parties at the time of the agreement.

THE RELATIONS OF PARTIES AT TIME OF CONTRACT.

We come now to the consideration of the circumstances existing at the execution of the contract, January 23, 1901.

It appears that at that time there were pending proceedings in divorce between these parties, and that to end the litigation and settle property rights this contract was consummated. In her testimony, the widow, while admitting that she signed the instrument, says that she did not know what she was signing, but thought it was simply a withdrawal of the divorce. After that she did not claim any of her husband's property. She thought it was all community property; paid all her own taxes and household expenses, and her husband never supported her, except to the extent of the twenty dollars per month which he paid for his board and lodging and laundry and care and attention given by her to him.

After that agreement he claimed none of her property; she claimed none of his, during his lifetime. They never actually separated, continued to live as before, domestically, but handled their property interests independently and individually, under the agreement, for twelve years, until he died.

What Patrick thought of the meaning and effect of this agreement may be gathered from the twelfth clause of his will, which is, after nominating the executrix and executor, as follows:

"Inasmuch as I have designated my wife, Margaret Menihan, as the sole beneficiary to a certain death benefit or policy of insurance in the sum of one thousand ($1000.00) dollars, which will become due upon my death from the Widows and Orphans Aid Association of the Police Department of the City and County of San Francisco, and inasmuch as my said wife and myself did on the 23d day of January, 1901, by a written agreement, executed by the both of us, fully and finally settle and adjust all business and property rights of each of us, I do not deem therefore that I am called upon in this my last Will and Testament to make any other or further provision for my said wife than hereinbefore provided."

From the time of the marriage, January 25, 1885, until his death, March 6, 1913, he lived continuously with his wife, except for twenty days, between January 3, 1901, and January 23, 1901, the date of the contract, which interval of interruption in their relations was due to the filing of the complaint for divorce; thenceforward, upon the execution of that agree-

ment, they continued their conjugal relations. There were no children. Patrick never contributed a dollar toward her support, except so far as, after the agreement, he paid her the twenty dollars already mentioned. At the time of the agreement Patrick was a retired policeman on a pension of fifty dollars a month. Mrs. Menihan says that he never supported her, except to the extent indicated. She always paid all household expenses.

THE FORCE AND EFFECT OF THIS AGREEMENT.

It is claimed now by Mrs. Menihan that this agreement is absolutely void, and, therefore, is not an estoppel; or, if it be not absolutely void, that it was legally avoided by the conduct of the parties thereto subsequent to its execution.

CHARACTER OF THE AGREEMENT.

The contestant relies primarily upon the statute to establish his contention that the agreement is absolutely void in law, and, quoting the concluding clause of the contract, which reads: "It is further understood and agreed that the party of the second part will make no claims upon the party of the first part for her sppport," cites section 155 of the Civil Code, which says, "Husband and wife contract toward each other obligations of mutual respect, fidelity, and support," and section 159, Civil Code:

"A husband and wife cannot, by any contract with each other, alter their legal relations, except as to property, and except that they may agree, in writing, to an immediate separation, and may make provision for the support of either of them and of their children during such separation."

Contestant contends that it is very evident that by the provisions of the contract quoted an attempt was made to alter the legal obligation resting upon the deceased to support his wife, and that accordingly, tested by the cited sections of the Civil Code, so much of the contract was certainly void; and, it is further contended that such void provision so entered and became a part of the consideration thereof as to make the entire contract void.

Section 1667 of the Civil Code provides, "that is not lawful which is (1) contrary to an express provision of law; (2)

contrary to the policy of express law, though not expressly prohibited; or, (3) otherwise contrary to good morals."

Section 1668 of the same code declares that all contracts which have for their object, directly or indirectly, to exempt anyone from responsibility for his own fraud, or willful injury to the person or property of another, or violation of law, whether willful or negligent, are against the policy of the law.

Section 1608 says that if any part of a single consideration for one or more objects, or of several considerations for a single object, is unlawful, the entire contract is void.

It is asserted by contestant that this agreement comes within these provisions, and that, therefore, the entire instrument is subversive of the statute and should be so cast out of court.

Numerous cases from many states are cited in support of this view.

Assuming, however, for the purpose of argument, that the agreement is not void, contestant claims that it was avoided by the subsequent conduct of the parties.

Upon this phase of the issue the points of the evidence already recited herein need not be repeated. The pith of the argument of contestant is that, the parties having concluded to reconcile their differences and resume their marital relations, from the moment of the reconciliation and resumption the entire plan of adjustment became null and void.

A long list of citations is made to sustain this proposition and the attention of the court is particularly directed to Hale v. Hale, 40 Okl. 101, 135 Pac. 1143, decided November 4, 1913, the latest case bearing upon this subject, and, it is suggested that the court will not fail to note the similarity of the statutes therein examined with our own, and will likewise be impressed with the splended citation of authorities referred to therein.

This court has examined the case of Hale v. Hale, and has been impressed with the industry and erudition of the writer of the opinion, but it is a statement of principles guiding the courts in strictly separation agreements, and the agreement here in question is not such a case.

The evidence here shows, as counsel on both sides agree, that from the very day of its execution down to the day of

the death of the husband there was no change in the matrimonial relations of the parties to the agreement.

They both acquiesced in and acted upon the agreement as to property rights.

This brings us to the terminal point.

This is not an agreement for a separation. There was neither in fact nor in law any separation, actual or constructive, physical or legal. The agreement did not provide for anything of the sort. So far from being subversive of the statute, it was in consonance with the Civil Code, which provides in section 158 that such contracts may be made between husband and wife.

"Either husband or wife may enter into any engagement or transaction with the other, or with any other person, respecting property, which either might if unmarried; subject, in transactions between themselves, to the general rules which control the actions of persons, occupying confidential relations with each other, as defined by the title on trusts."

It was a contract as to property solely, and such as they were competent mutually to make.

"Neither husband nor wife has any interest in the property of the other, but neither can be excluded from the other's dwelling": Civ. Code, sec. 157.

"A husband and wife cannot by any contract with each other, alter their legal relations, except as to property, and except that they may agree, in writing, to an immediate separation, and may make provision for the support of either of them and of their children during such separation": Civ. Code, sec. 159.

That such an agreement is valid and effectual under the statute seems to have been the consistent holding of our supreme court. It is a settlement of property rights and not a contract of separation, and hence the cases on separation agreements are not absolute authority.

Having arrived at this conclusion, it is not necessary to decide upon the other points, except to suggest, without now deciding, that if this court err in respect to the agreement, contestant seems to be correct as to the other contentions.

In support of the contention that the contract in the foregoing case was invalid, counsel for the widow cited sections 155, 159, 1608, and 1667 of the Civil Code. He also cited the case of Foxworthy v. Adams, 136 Ky. 403, Ann. Cas. 1912A, 327, 27 L. R. A. (N. S.) 308, 124 S. W. 381, wherein it is said: "Notwithstanding the statutory power of husband and wife to contract with each other, husband and wife may not contract with each other for the payment by the husband to the wife for her services in nursing him during his illness; it being the duty of husband and wife to attend, nurse and care for each other, where either is unable to care for himself."

To like effect he cited Ryan v. Dockery, 134 Wis. 431, 126 Am. St. Rep. 1025, 114 N. W. 820, 15 L. R. A. (N. S.) 419; Michigan Trust Co. v. Chapin, 106 Mich. 384; 58 Am. St. Rep. 490, 64 N. W. 334; Corcoran v. Corcoran, 119 Ind. 138, 12 Am. St. Rep. 391, 4 L. R. A. 782, 21 N. E. 468; Merrill v. Peaslee, 146 Mass. 460, 4 Am. St. Rep. 334, 16 N. E. 271; Smutzer v. Stimson, 9 Colo. App. 326, 48 Pac. 314.

In support of his contention that, assuming that the contract was not invalid, it was avoided by the conduct of the parties thereto subsequently to its execution, he cited: Wells v. Stout, 9 Cal. 479; Sargent v. Sargent, 106 Cal. 541, 39 Pac. 931; Jones v. Lamont, 118 Cal. 501, 62 Am. St. Rep. 251, 50 Pac. 766; Estate of Martin, 166 Cal. 399, 137 Pac. 2; Estate of Yoell, 164 Cal. 542, 129 Pac. 999; Roberts v. Hardy, 89 Mo. App. 86; In re Smith, 13 Misc. Rep. 592, 36 N. Y. Supp. 820; Knapp v. Knapp, 95 Mich. 474, 55 N. W. 353; Hartl v. Hartl, 155 Iowa, 329, 135 N. W. 1007; Zimmer v. Settle, 124 N. Y. 37, 21 Am. St. Rep. 638, 26 N. E. 341; Gaster v. Gaster, 90 Neb. 529, 125 N. W. 235; Hale v. Hale, 40 Okl. 101, 135 Pac. 1143; James v. James, 81 Tex. 373, 16 S. W. 1087; Stidum v. Stidum, 164 Ill. App. 261; Dennis v. Perkins, 88 Kan. 428, 43 L. R. A. (N. S.) 1219, 129 Pac. 165.

In this connection he called particular attention to the case of Hale v. Hale, 40 Okl. 101, 135 Pac. 1143.

Counsel for the executor, in arguing for the validity of the contract quoted the following from In re Davis, 106 Cal. 456, 39 Pac. 756.

"The agreement of separation entered into between Davis and wife was a contract which they were competent to make with one another, and one in fact expressly authorized by statute: Civ. Code, secs. 158, 159. It rested upon good and sufficient consideration, and was fully carried out. The obvious purpose was not only to definitely sever the property rights of the parties, but mutually to relinquish and release all inheritable interest of each in the property and estate of the other. It was apt and ample in form for the purpose, and that such was its effect we have no doubt. And that its purpose and effect in that regard are to be upheld is fully sustained by authority."

To like effect counsel cited the following cases: In re Davis, 106 Cal. 456, 39 Pac. 756; In re Noak, 73 Cal. 583, 2 Am. St. Rep. 829, 15

Pac. 287, 88 Cal. 468, 26 Pac. 361; Wickersham v. Comerford, 96 Cal. 433, 31 Pac. 358; Estate of Garcelon, 104 Cal. 570, 43 Am. St. Rep. 134, 32 L. R. A. 595, 38 Pac. 414; Sargent v. Sargent, 106 Cal. 541, 39 Pac. 931; Jones v. Lamont, 118 Cal. 499, 62 Am. St. Rep. 251, 50 Pac. 766; Kaltschmidt v. Weber, 145 Cal. 599, 79 Pac. 272; Estate of Edelman, 148 Cal. 236, 113 Am. St. Rep. 231, 82 Pac. 962; Estate of Wickersham, 153 Cal. 607, 96 Pac. 311; Estate of Hite, 155 Cal. 440, 101 Pac. 443, 17 Ann. Cas. 993, 21 L. R. A. (N. S.) 953; Estate of Miller, 156 Cal. 121, 23 L. R. A. (N. S.) 868, 103 Pac. 842; Estate of Yoell, 164 Cal. 540, 129 Pac. 999; Estate of Martin, 166 Cal. 399, 137 Pac. 2; Estate of Scott, 147 Pa. 102, 23 Atl. 214; Crum v. Sawyer, 132 Ill. 443, 24 N. E. 956; Daniels v. Benedict, 97 Fed. 367, 38 C. C. A. 592.

Counsel maintained further that a defense founded upon such an agreement, by way of estoppel, is cognizable by the court in probate, citing: Estate of Edelman, 148 Cal. 236, 113 Am. St. Rep. 231, 82 Pac. 962; Estate of Garcelon, 104 Cal. 570, 43 Am. St. Rep. 134, 32 L. R. A. 595, 38 Pac. 414; Young v. Hicks, 92 N. Y. 235.

That the probate court has no jurisdiction to try title, counsel cited the following cases: Estate of Yoell, 164 Cal. 546, 129 Pac. 999; Estate of Vance, 141 Cal. 627, 628, 75 Pac. 323; Burris v. Kennedy, 108 Cal. 335–344, 41 Pac. 458; Burris v. Adams, 96 Cal. 667, 31 Pac. 565; Wetherly v. Straus, 93 Cal. 283, 28 Pac. 1045.

That the status of the spouses, as recognized and provided for by the agreement, was not subsequently changed so as to invalidate the agreement counsel cited the following authorities: Wells v. Stout, 9 Cal. 491; Baird v. Connell, 121 Iowa, 278, 96 N. W. 865; note in Ann. Cas. 1933A, 1330.

IN THE MATTER OF THE ESTATE OF HENRIETTA REDMOND, DECEASED.

[No. 10,971 (N. S.).]

Inheritance Tax—Exemptions—Adopted Child.—The claimant for exemption in this case is found to be "a child adopted" or "child to whom . . . decedent stood in the relation of parent,' within the meaning of sections 5 and 7 of the inheritance tax law.

Albert H. Elliott, for the state.

Sullivan & Sullivan and Theodore J. Roche, for Henrietta Redmond Johnson, claiming exemption.

COFFEY, J. Upon the statement of facts, conceded to be substantially correct, there is no doubt in the mind of this court that Henrietta Redmond Johnson held the relation of child toward the deceased, mutually acknowledged, in the letter and spirit of the statute of 1905.

The admitted facts are as follows:

Henrietta Redmond Johnson was born in 1879. Her birth name was Sheehan, and she was a niece of James Redmond, the deceased husband of the above-named Henrietta Redmond, deceased. When about thirteen months of age she was taken into the family of James and Henrietta Redmond, and was reared, maintained, supported, educated and trained by said James and Henrietta Redmond up to the time of the death of James Redmond in 1891. She was also adopted by said James Redmond, with the consent of his wife, some time before his death. At the time of the death of said James Redmond, said Henrietta Redmond Johnson was of the age of twelve years or thereabouts. Thereafter, she continued to live with the above-named deceased, who supported, maintained, clothed and educated her. She was sent to school and to the convent by said deceased, who paid as much as five hundred dollars a year for her education and maintenance at the convent. During the vacation period she always returned to the home of said deceased. Said deceased always gave to said Henrietta Redmond Johnson the care and protection of a mother, and exhibited the same interest in her welfare that her mother did as a child. This is corroborated by the letter of said deceased, written to the Mother Superior of the convent with reference to the choice of her vocation in life. Although christened Henrietta Sheehan, said Henrietta Redmond Johnson was from her very infancy up to the time of her marriage known as Henrietta Redmond. She always acquiesced in the right of deceased to control her training, and gave her the obedience and respect which a child ordinarily yields to her mother. After she had grown up she attended to the household duties almost entirely, and took care of deceased, never, however, receiving any salary or wages, but was maintained, supported and clothed by said deceased and given money by said deceased

for incidental expenses. This relation continued between said Henrietta Redmond Johnson and said deceased, up to the time of her marriage on June 1, 1908. In connection with her marriage, the following facts are significant:

Her fiancé made known to said deceased his intention to marry Henrietta Redmond Johnson, and asked her consent thereto. Said deceased made objection to said fiancé, upon religious grounds, with the result that he agreed to embrace her religion. He was subsequently baptized therein, and said deceased stood sponsor for him at that time. Said deceased participated in all the arrangements for the wedding, provided the trousseau, and directed the wording of the invitations by which the guests were invited to be present at the marriage of "her daughter, Henrietta Frances."

After her marriage said Henrietta Redmond Johnson continued to live with deceased for a short period, but subsequently left, owing to a disagreement between her husband and said deceased. Nevertheless, she continued to visit said deceased and to maintain toward her the same form of intimate relations, as far as was possible under the changed conditions. The only difficulty between deceased and Henrietta Redmond Johnson occurred in the year 1898, when, as the result of an unfounded accusation made by deceased against Henrietta Redmond Johnson, the latter left home for a period of about two months. The controversy was then settled amicably between the parties, and Henrietta Redmond Johnson went back to live with said deceased, and remained with her for more than ten years, in the same relation which had theretofore existed between them.

In her will, which has been admitted to probate herein, deceased left the bulk of her estate, after the payment of a few specific legacies, to Henrietta Redmond Johnson and her children.

It should seem conclusively from this statement that the deceased and Henrietta Redmond Johnson, for not less than ten years prior to the death of decedent, stood in the mutual relation of parent and child.

The transient disturbance and disagreement was a mere domestic dissension and not to be counted against the con-

tinuity of the relation any more than if they were by nature mother and daughter. It was a mere incident not calculable in the domestic relations.

The reciprocal relations so long subsisting could not be affected by any temporary breach or casual difference or estrangement. Such occurrences are common, even in the best regulated families, and import nothing, as in this case, according to the statement, except that the parent had some objections to the choice by the child of a husband or wife, which objection here was subsequently overcome by the submission of the fiancé to the conditions imposed by the foster mother, and she stood sponsor for him at his baptism.

There could not be a clearer case.

In addition she made all the arrangements for the wedding, issued the invitations for the guests at the marriage of "her daughter Henrietta Frances."

Apart from the statutory adoption by the husband of deceased, the circumstances show and the direct evidence is adequate that the child was treated as a daughter and was regarded as such by the deceased and always occupied such status, being obedient to and dependent upon her foster parents, and that is all that the statute requires, and there can be no higher proof of mutual acknowledgment. This is the sum of all the authorities.

This court has read all of the cases cited and quoted by counsel, but there is not one of them more cogent in favor of the claimant than the case at bar, and her contention is sustained on all points.

The amount paid as commission on sale of real estate should be allowed as a deduction from the expenses of administration.

As to Exemption from the Inheritance Tax of adopted children or persons to whom the decedent stood as parent, see Ross on Inheritance Taxation, pp. 180–184.

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writing made contemporaneously with the gift. Such character cannot be imparted, ex post facto, by a writing at a later date.—Estate of Spreckels, 375.

Advancement—Change of Gift to Advancement.—A donor may change an advancement into an absolute gift without the knowledge or consent of the donee, but he cannot change an absolute gift into an advancement without the consent of the donee in writing.—Estate of Spreckels, 375.

Advancement — Partial Intestacy — Code Changes.—An intent to alter a pre-existing law is not to be inferred from a mere change of phraseology in a revision of prior statutes. Under the English statute, and under the statutes of many states of the Union, the rule is well settled that the doctrine of advancements is applicable only in cases of total intestacy. An examination of the history of the code and a comparison of code contexts show that the California codifiers did not intend to make such a distinction in the use of the word "intestate" in the old statute, and the word "decedent," in sections 1395–1399 of the Civil Code, as would justify the court in holding that it was the purpose to change the well-settled rule that the doctrine of advancements can be invoked only in cases of total intestacy. Therefore the doctrine of advancements cannot be invoked in cases of partial intestacy.—Estate of Spreckels, 375.

Advancement.—Where a Parent in His Lifetime, had Made Large Gifts to two of his sons, and in his will made several years later, declared: "I make no provision in this will for my sons J. and A., for the reason that I have already given to them a large part of my estate,"—such declaration does not charge such gifts as advancements under the code. Where a donor has made an absolute gift there is no method in which he can make it effective as an advancement short of a legally executed will disposing of his property.—Estate of Spreckels, 375.

ANNUITIES.

Annuity—Protection of Residuary Legatees.—When a testator gives his brother a specified sum per annum, to be paid during his lifetime from the interest of money to be invested by the executors, and directs the principal sum and the overplus interest to be paid to the residuary legatees when the annuity ceases, the investment of the fund should be made with due regard to the interests of such legatees.—Estate of Zeile, 363.

Annuity—Investment of Fund.—When a testator bequeaths to his brother a specified sum per annum for life, payable quarterly, the principal sum and the overplus interest thereon to be divided among the residuary legatees when the annuity ceases, the court, in order to provide for the required income, will direct the retention of city real property belonging to the estate and yielding an income slightly

ATTORNEY FEES.

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CHARITIES.

Will—Charitable Bequest—Mistake in Name of Charity.—A bequest to the "United Charities of San Francisco" will be given effect as a bequest to "The Associated Charities of San Francisco," there being no institution in San Francisco bearing the name "United Charities," it being evident that the testator had in mind a union or association of charitable organizations in the city, but that he mistook the name while retaining the idea.—Estate of Irwin, 359.

A Charitable Bequest to "The Old Ladies' Home, at present near Rincon Hill, at St. Mary's Hospital," has been held to have been intended for the "Sisters of Mercy," a corporation embracing, as part of its charitable design, "The Old Ladies' Home": Estate of Gibson, 1 Cof. Prob. Dec. 9.—Estate of Irwin, 359.

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See Election by Widow; Husband and Wife; Wills.

COMPENSATION OF EXECUTOR.

See Executors and Administrators, 5.

COMPENSATION OF TRUSTEE.

See Trusts, 1.

CONTEST OF WILL.

See Insanity and Insane Delusions; Testamentary Capacity; Undue Influence.

Will—Contest—Evidence—Burden of Proof. While it would be incumbent on the proponent, if there were no contest, in a case [illegible]

the one at bar, to establish the authenticity of the handwriting of the decedent in the will, which is holographic, and the circumstances of the execution of the document to the extent of her knowledge, yet it is true, in a sense, that the burden of proof rests upon the contestant and he must bear his own burdens as to the issues set up by him; and where it is not denied that the instrument is in the handwriting of decedent, so far as the contest is concerned, it is incumbent upon him to prove a negative, that she was not competent; that the will was not the voluntary emanation of her own mind, or that she was not free from circumstance of constraint. Any one of these facts established justifies the contest, but does not relieve the proponent ultimately from her burden of establishing all the elements necessary to entitle her to letters testamentary.—Estate of De Laveaga, 55.

Will Contest—Issues—Unsoundness of Mind and Undue Influence—Consistency of Issues.—In a will contest the issues of unsoundness of mind of the testatrix and undue influence exerted upon her are not inconsistent. While these issues are distinct as a rule, there may be a case where a person of immature intellect may be so influenced by one of superior power as to direct the manual performance of the mechanical act.—Estate of De Laveaga, 55.

Will Contest—Evidence—Circumstances Before and After Admissible.—In such a case, the evidence should not be confined to the point of time of the testamentary act alone; it is proper to allude to the surroundings of the decedent at the time of making the will and for the years prior and subsequent thereto.—Estate of De Laveaga, 55.

Will Contest—Evidence—Credibility of Witnesses.—In such a case, in determining the credibility of witnesses who testify as to the mental competency of the testatrix, their opportunities, their intimacies, their relations to the parties, and many other major and minor elements, must be considered before accepting as absolute their opinions upon a matter of such moment as the mentality of a person.—Estate of De Laveaga, 55.

Will Contest—Burden of Proof.—In proceedings to contest the validity of a will the burden of proof is on the person asserting the invalidity.—Estate of Bainbridge, 308.

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EXECUTORS AND ADMINISTRATORS.

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1. In General.

Administrator—Relation Toward Heirs and Estate.—An administrator sustains to the estate, the heirs and other persons interested the relation of trustee. He takes neither an estate, title nor interest in the lands of the intestate, but a mere naked power to sell for specific purposes.—Estate of Barrett, 398.

An Executor is Accountable for All the Assets that come into his possession, excepting where loss may have been suffered without his fault.—Estate of Strauss, 411.

2. Persons Entitled to Letters.

Administration—Whether Relatives Entitled to.—The relatives of a decedent are entitled to administer only when they are entitled to succeed to the personal estate or some part thereof.—Estate of Barrett, 398.

Administration — Husband as Relative of Wife.—A husband is of "kin" to his wife and her "relative," so as to be entitled to administer on her estate under section 1365 of the Code of Civil Procedure. Estate of Barrett, 398.

Administration of Wife's Estate by Husband.—If a widower dies intestate leaving collateral relatives and one child, a daughter, and she, before the estate is administered, dies intestate, without issue, her surviving husband is entitled to administer her estate as against the collateral relatives of her father.—Estate of Barrett, 398.

Administrator—Rivals for Appointment.—The Daughter of the Intestee, who has been granted special letters of administration, is in this case granted general letters, as against the public administrator and a son who, by reason of dissolute habits, is incompetent to act.—Estate of Moraghan, 486.

Administration Follows Property.—The right to administer follows the property.—Estate of Barrett, 398.

Administration — Statutory Kinship.— The law of administration contemplates a legal or statutory kinship as well as a kinship by blood. Estate of Barrett, 398.

3. Eligibility or Competency.

Administrator.—No Person is Eligible or Entitled to Serve as administrator who is incompetent to execute the duties of the trust by reason of drunkenness, improvidence or want of understanding or lack of integrity, and it must be presumed that the appointing power discharged its duties and appointed a sane, sober, provident and honest man to execute the trust of administrator.—Estate of Mahoney, 1.

Administrator—Person Incompetent to Act.—A person who has dissolute, intemperate and improvident habits is not competent to act as administrator of his father's estate.—Estate of Moraghan, 486.

Administrator—Competency Determined of What Time.—It is the status of the petitioner at the time of the grant of administration that determines his competency.—Estate of Barrett, 398.

4. Nomination of Administrator.

Administrator—Right to Nominate.—In the case of a surviving husband or wife the right to nominate an administrator under section 1365 of the Code of Civil Procedure is absolute, while in the case of other persons contemplated by section 1379 the right is at most a mere power to address a recommendation to the discretion of the court.—Estate of Barrett, 398.

Administrator—Death of Nominor.—If the daughter of a deceased person gives a third person authority to apply for letters of administration in her behalf, the power so granted ceases and determines at her death.—Estate of Barrett, 398.

Administrator—Person Incompetent to Nominate.—One who, by reason of dissolute, intemperate and improvident habits, is incompetent to act as administrator of his father's estate, has no right to nominate his copetitioner, the public administrator, to act as administrator in his place, or to nominate him to act jointly with the public administrator.—Estate of Moraghan, 486.

Revocation of Letters of Administration—Competency of Parties.—Where letters of administration with the will annexed have been granted to the public administrator on the estate of a deceased nonresident, a resident brother of the decedent, though not entitled to letters on an original application because of section 1365 of the Code of Civil Procedure, may nominate a stranger to petition for a revocation of the letters granted and for the issuance of letters to the petitioner, and the petition will be granted, both the nominor and the nominee being competent, under section 1369 of the Code of Civil Procedure, to serve as administrators.—Estate of Tracy, 494.

5. Commissions and Compensation—Attorney Fees.

Executors—Application for Allowance and Commissions.—Section 1616 of the Code of Civil Procedure, as amended in 1911, [illegible]

FAMILY ALLOWANCE.

FOREIGN CORPORATION.

FRAUD.

GUARDIAN AD LITEM.

GUARDIANSHIP.

See Testamentary Capacity, 1.

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adjudication of incompetency as showing want of testamentary capacity, 21–26.

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HOMESTEAD.

Probate Homestead—Court must Set Apart.—In a proper case the court must, on the application of a surviving husband, set apart a probate homestead; there is no discretion.—Estate of Sykes, 503.

HUSBAND AND WIFE.

See Marriage; Succession.

Husband and Wife—Contract Between for Settlement of Property Rights.—Where husband and wife, she having instituted an action for divorce and they having subsequently arrived at an adjustment of their differences both as to their properties and their domestic affairs, enter into an agreement whereby they adjust their property rights and thereafter live together without any change in their matrimonial relations, the contract is valid under section 158 of the Civil Code. Such an agreement is a settlement of property rights, not a contract for separation, and the decisions on separation agreements are therefore not absolute authority. The agreement is not invalidated by a provision that the wife will make no claims upon the husband for her support.—Estate of Menihan, 535.

IMPROVIDENCE.

See Testamentary Capacity, 6.

INCOME.

See Trusts, 4, 5.

INFANTS.

See Guardian ad Litem; Testamentary Capacity, 3.

Infant—Conclusiveness of Judgment.—An Infant can be Bound without having his day in court, and is as much bound as a person of full age by a decree in equity, the same grounds being available to both for disputing it.—Estate of Lamb, 432.

INHERITANCE TAX.

Inheritance Tax—Nature and Effect.—The inheritance tax is not a tax in the ordinary sense of the word, but is a charge imposed by law

for the privilege of inheriting or taking by will; since this is a right only by statutory enactment and is entirely under the control of the legislature.—Estate of Paige, 525.

Inheritance Tax—Right of Legislature to Impose.—Each state has the right, unless prohibited by its constitution, to make a charge for the privilege of receiving by will or by inheritance any property within its borders.—Estate of Paige, 525.

Inheritance Tax—Situs of Corporate Stock.—While for most purposes a chose in action adheres to the person of its owner, for the purpose of administration it does not. For such purpose the situs is where the debtor resides. Stocks of California corporations constitute property of a decedent actually in this state.—Estate of Paige, 525.

Inheritance Tax—Exemptions—Adopted Child.—The claimant for exemption in this case is found to be "a child adopted" or "child to whom . . . decedent stood in the relation of parent," within the meaning of sections 5 and 7 of the inheritance tax law.—Estate of Redmond, 546.

INSANITY AND INSANE DELUSIONS.

See Testamentary Capacity.

1. Insane Delusions.

Insane Delusions.—Prejudices, Dislikes and Antipathies, however ill-founded or strongly entertained, cannot be classed as insane delusions.—Estate of Ellinghouse, 332.

Insane Delusions.—If One's Mind is Tricked or Deceived into a false opinion, it is played upon, or deluded.—Estate of Ellinghouse, 332.

Insane Delusions.—An Insane Delusion is the Spontaneous Production of a diseased mind leading to the existence of something that either does not exist or does not exist in the manner believed—a belief not entertainable by a rational mind, yet so firmly fixed that neither argument nor evidence can convince to the contrary.—Estate of Ellinghouse, 332.

Insane Delusions.—In Order to Attack Successfully a Will on the ground of insane delusions had by the testator, it must be shown that such delusions operated to cause the production of the will.—Estate of Ellinghouse, 332.

2. Excessive Use of Intoxicants.

Insanity.—The Habitual and Excessive Use of Intoxicating Liquors as a beverage may result in permanent insanity. By permanent insanity is meant in this connection not merely dipsomania, but a condition of fixed and continued mental unsoundness.—Estate of Mahoney, 1.

MINORS.

See Infants.

MORTGAGES.

See Trusts, 6.

NEW TRIAL.

New Trial—Duty of Court on Motion to Grant.—The trial court is not only authorized but in duty bound, on motions for a new trial, to scrutinize the evidence carefully, in cases where claimed to be insufficient, and to grant new trials whenever, in its opinion, the evidence the decision or verdict was based on is insufficient to justify the conclusion.—Estate of Bainbridge, 308.

NOMINATION OF ADMINISTRATOR.

See Executors and Administrators, 4.

Note.

nomination of administrator, 491–493.

NOTICE.

See Family Allowance.

NOTICE TO CREDITORS.

Notice to Creditors—Decree Establishing—When Made.—An executrix, having caused notice to creditors to be duly published, is entitled to a decree establishing that due notice to creditors has been given, although the attorney for the estate, at whose office claims were by the notice required to be presented has removed his office, during the period designated in the notice, within which claims might be presented.—Estate of Labarthe, 499.

Notice to Creditors—Power to Give Further Notice.—Notwithstanding the removal of the executrix's place for transacting the business of the estate, the court has no power to direct the giving of a further notice.—Estate of Labarthe, 499.

Notice to Creditors—Change in Place of Presenting Claims—Rights of Creditors.—The decree establishing due notice to creditors should not be refused under these circumstances because of the bare possibility that there may exist some creditor who, by reason of the removal, has been unable to properly present his claim. Having been put on inquiry by the notice which was duly published he is obliged to take such further steps as may be reasonable to ascertain the present place of business of the estate.—Estate of Labarthe, 499.

PARTIAL DISTRIBUTION.

See Trusts, 3.

RESIDUARY BEQUEST.

See Wills, 6.

Note.

whether specific, demonstrative or general, 288–290.

RETROSPECTIVE ACT.

See Statutes.

SPECIFIC LEGACIES.

See Wills, 5.

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defined and distinguished from demonstrative and general bequests, 250–292.

STATUTES.

Statutes—Retrospective Operation.—A Remedial Statute, unless it provides to the contrary, is to be given a retrospective effect, if to do so does not violate some vested right or constitutional guaranty.—Estate of Ellis, 413.

STIPULATIONS.

Stipulation as to Evidence—Reference to Outside Facts.—Counsel after signing a stipulation to the effect that the statement contains all the material evidence is in no condition to argue that the court should look outside for facts to base its decision upon.—Estate of Bainbridge, 308.

SUCCESSION.

Descent—Law Purely Statutory.—The descent of estates of deceased persons is purely a matter of statutory regulations.—Estate of Barrett, 398.

Descent—Vesting of Estate in Heir.—Immediately upon the death of an ancestor his estate, both real and personal, vests at once by the single operation of law in the heir.—Estate of Barrett, 398.

Descent—Husband as Heir of Wife.—If a widower dies intestate leaving collateral relations and one child, a daughter, and she, before the estate is administered, dies intestate without issue, leaving neither father, mother, brother nor sister, the estate vests in her surviving husband as her heir under subdivision 5 of section 1386 of the Civil Code.—Estate of Barrett, 398.

TAXATION.

See Inheritance Taxation; Trusts, 4.

TESTAMENTARY CAPACITY.

See Contest of Will; Insanity and Insane Delusions.

1. In General.

Will—Capacity to Make.—Under the Statutes of California every person over the age of eighteen years may by last will dispose of his or her estate, provided he or she is of sound mind and free from undue influence, duress, or fraud.—Estate of De Laveaga, 55.

Will—Tests of Testamentary Capacity.—If a testator has sufficient memory and intelligence fairly and rationally to comprehend the effect of what he is doing, to appreciate his relations to the natural objects of his bounty, and understand the character and effect of the provisions of his will; if he has a reasonable understanding of the nature of the property he wishes to dispose of, and of the persons to whom and the manner in which he wishes to distribute it, and so express himself, his will is good. It is not necessary that he should act without prompting.—Estate of Egan, 28.

Will—Constituents of Testamentary Capacity.—The constituents of testamentary capacity are that the testator has an idea of the character and extent of his property, and is capable of considering the persons to whom and the manner and proportion in which he wishes his property to go.—Estate of Egan, 28.

Will—Capacity of Testatrix Established.—The testatrix in this case responds to the foregoing conditions. She was competent to make her will and was free from undue influence.—Estate of Egan, 28.

Will.—The Tests of Testamentary Capacity are: 1. Understanding of what the testator or testatrix is doing; 2. How he or she is doing it; 3. Knowledge of his or her property; 4. How he or she wishes to dispose of it; and 5. Who are entitled to his or her bounty.—Estate of De Laveaga, 55.

Will—When Capacity Lacking.—It is not Enough that the testator or testatrix have a mind sufficient to comprehend one of the above elements; his or her mind must be sufficiently clear and strong to perceive the relation of the various elements to one another, and he or she must have at least a general comprehension of the whole.—Estate of De Laveaga, 55.

Will — Testamentary Capacity — Person Under Guardianship.—The fact that the testator, at the time of the execution of the will, is in charge of a guardian as an habitual drunkard, while relevant as some evidence of incapacity, is never conclusive that a will is invalid.—Estate of Mahoney, 1.

2. Circumstances Affecting or Indicating.

Will—Testamentary Capacity—Ability to Speak Several Languages. The fact that the testatrix in such a case was able to speak in several languages is not in itself proof of intellectual power.—Estate of De Laveaga, 55.

Will—Mental Capacity—Undue Influence—Justness of Will.—While, if the testatrix be of sound mind, it matters not whether her will be equitable or inequitable, just or unjust, as she has the right to do as she pleases with her property, nevertheless, equity, justice, the relations of the parties, the surroundings of those benefited in connection with the testatrix and other points may be considered in connection with the transaction, where the competency is questioned or susceptibility to influence suggested.—Estate of De Laveaga, 55.

Will—Mental Capacity—Undue Influence—Ignoring Benefactor.—In such a case the improbability of a person ignoring or discriminating against one who has been of great service to her for many years and who had conserved her estate without the diminution of a dollar, on the contrary with increase and without retaining anything for personal benefit, is a proper subject of inquiry, as to whether if she were of full faculty and free from the impediment of influence she would have done otherwise; and it might be inferable that those who had been in close propinquity and who were the beneficiaries of her bounty had improved their opportunities to their own advantage.—Estate of De Laveaga, 55.

Will—Mental Capacity—Ability of Testatrix to Write.—The mere fact that one can write does not imply soundness of mind; and in a case like the one at bar the circumstances must be considered and inquiry made into all the facts and history, and the conduct and surroundings of the person whose mental condition is at issue, before passing judgment.—Estate of De Laveaga, 55.

Will—Mental Capacity of Testator—Will Itself as Evidence.—On the question of the mental soundness of a testator, the will itself is evidence in connection with the sworn testimony of the draftsman that the deceased dictated the details to him.—Estate of Bainbridge, 308.

Will—Mental Incapacity of Testatrix—When not Shown.—That a testatrix at the age of eighty-four was incompetent to dispose of her property is not shown by a witness who testifies: "Regarding money matters I formed a very strong opinion that she was in her right mind, for one thing, but in regard to other matters she did not seem to be right. But in money matters she seemed to be very strong."—Estate of Bainbridge, 308.

Will—Testamentary Incapacity—Gift to Strangers as Showing.—That a woman of eighty-four by her last will seeks to benefit strangers in blood who have benefited her, instead of leaving all her estate to collateral relatives, does not tend to show that a life-long addiction to drink in excess and other bad habits have impaired her mind.—Estate of Bainbridge, 308.

Will—Competency of Testator—Evidence.—On the issue of mental competency of a testator and undue influence in the execution of his

will, evidence of the pecuniary circumstances of a legatee and of her husband is inadmissible.—Estate of Brown, 26.

Will—Competency of Testatrix—Instrument Itself as Indicating.—A will itself is an evidence which must be considered by the court as establishing the mental integrity of the testatrix.—Estate of Egan, 28.

3. **Age and Physical Condition.**

Will—Minimum Age Limit of Testator.—A testator or testatrix need not be expected to know the exact legal scope and bearing of his or her will, but should have sufficient faculty to understand generally his or her circumstances and natural obligations. The age of eighteen years in this state is fixed as the minimum limit at which that faculty is developed in a normal nature; in some other states and countries it is twenty-one.—Estate of De Laveaga, 55.

Will—Competency of Testator—Age and Physical Infirmities.—Evidence of the advanced age of a testator and of his physical infirmities, if they did not impair the operation of his mind in the making of his will, does not establish testamentary incapacity.—Estate of Brown, 26.

Will—Dotage on Part of Testatrix—Insufficiency of Evidence.—That a woman in her old age recapitulates in her will her struggle to acquire a competence and expresses gratitude for aid received and a desire to reward through legacies those extending it to her, is not evidence of dotage such as to impair testamentary capacity.—Estate of Bainbridge, 308.

4. **Immature Mental Development.**

Will—Immature Mental Development of Testator.—Although a person may not be subject to delusions or mental aberrations, nor suffering from active insanity nor entirely destitute of understanding, yet he or she may not have arrived at that maturity of mind which qualifies him or her to make a will and is deficient in testamentary capacity.—Estate of De Laveaga, 55.

Will—Mentally Undeveloped Testatrix.—A woman who has reached the age of eighteen may make a will if she be otherwise qualified, but she may have arrived at this age without having emerged in mental growth from childhood. This does not import a disordered intellect or diseased mind, and is entirely consistent with the general fact that the family of the decedent was composed of persons of sound and strong mentality, and that her inherent traits were intellectually perfect, there being no suggestion of insanity in the blood. It is also consistent with the fact that the decedent was a woman in the full bloom of health; fully nourished bodily, with no serious corporal ailment, no congenital incapacity, physically a perfect woman, but short on intellect.—Estate of De Laveaga, 55.

5. Epilepsy.

Will—Epilepsy.—No One Possesses Testamentary Capacity during the actual paroxyms of an epileptic seizure, and the importance of proof that the deceased was subject to epileptic fits depends wholly on the proximity of the fit to the time of the execution of the will. The fact that the testator has had an epileptic seizure raises no presumption of continuing incapacity, and proof of epilepsy does not cast the burden of proving a lucid interval upon the proponent.—Estate of Mahoney, 1.

6. Intemperance, Dissipation and Improvidence.

Will—Testamentary Capacity—Intemperance and Improvidence.—A man may be greatly given to the use and abuse of liquor and yet be competent to make a will. He may be incompetent to manage an estate by reason of intemperance and improvidence and yet retain sufficient capacity for testamentary disposition.—Estate of Mahoney, 1.

Will — Testamentary Capacity — Dissipation and Intoxication.—No rule of law denies to a man who is dissipated and habitually addicted to the excessive indulgence in intoxicants the right to make a will. Estate of Mahoney, 1.

Will—Testamentary Capacity.—The Habitual Use of Intoxicating Liquors, long continued and indulged in to excess, even though resulting in temporary fits of insanity or delirium tremens, does not alone raise a presumption of testamentary incapacity, if it appears that the testator was sufficiently sober when executing the will to know what he was doing, and that he was not unduly influenced. Nor need he be shown to have been wholly sober at the instant of the execution of the will if it is proved that he was sufficiently so to understand the character and effect of his act, the extent of his property and the nature of the claims of his kin, and be able to act of his own will.—Estate of Mahoney, 1.

Will—Intoxication of Testator.—In Order to Vitiate the Act, the testator, at the time of executing the paper, must have been under the influence of intoxicating liquors and to such an extent as to disorder his faculties and prevent his judgment.—Estate of Mahoney, 1.

Will.—The Intoxication of the Testator, if It is Proved to exist at the date of the execution of the will, must, in order to invalidate it, have been of such a character as to have deprived him of judgment while executing it.—Estate of Mahoney, 1.

Will.—In Order That the Will of a Drunkard may be Invalidated because of his habits of intoxication, it must appear affirmatively either that his mind was totally destroyed thereby or that he was so far under the influence of intoxicants at the instant of its execution that he was incapable of comprehending the nature, extent and disposition of his estate and his relations to those who have a claim upon his bounty.—Estate of Mahoney, 1.

Will—Testamentary Capacity—Lucid Intervals.—In Cases of Temporary Delirium, arising from the excessive use of stimulants, where no question of fixed and mental unsoundness is involved, the doctrine of lucid intervals does not apply.—Estate of Mahoney, 1.

7. —— Evidence.

Will—Habitual Drunkard—Judicial Determination.—The burden of proof is upon the contestant, even where it conclusively appears that the testator has been judicially pronounced an habitual drunkard, to show that he was in such a condition from intoxicants at the time of execution as not to have testamentary incapacity.—Estate of Mahoney, 1.

Will—Intoxication.—No Presumption That a Man was so Drunk when he made a will that he was incapable of making it properly arises from proof that he had been drunk at a prior period or that he was an habitual drunkard.—Estate of Mahoney, 1.

Will—Intoxication of Testator—Burden of Proof.—Though the testator may have, when under the influence of liquor, acted like a maniac, still, if when subsequently sober he acted rationally and sanely, the burden is on the party asserting his testamentary incapacity, to show that he was incapable at the date of the execution of the will. The rule is the same where it conclusively appears that on one or more occasions prior to the time of execution, the testator had had attacks of dipsomania.—Estate of Mahoney, 1.

Will.—In Testifying to the Intoxication of the Testator, a witness is merely stating his opinion as to his condition, and any person who knows the testator, though he be not an expert, may testify to the fact that he was intoxicated upon a stated occasion, for the subject is one upon which any intelligent person is competent to form an opinion.—Estate of Mahoney, 1.

Will—Intoxication of Testator.—A Witness will not be Allowed to State that, in his opinion, the testator was so drunk at the date of execution as not to be capable of making a valid will, or to give his opinion that he was unduly influenced in the making of his will by reason of intoxication.—Estate of Mahoney, 1.

Will.—A Witness may Testify That, in His Opinion, the Testator was an habitual drunkard, though his habitual drunkenness has never been judicially determined.—Estate of Mahoney, 1.

Will.—Where the Testator is Alleged to have Been Drunk at the time he executed the will, it is admissible to prove his conduct upon previous occasions when he was under the influence of drink, to illustrate his usual manner of acting when intoxicated.—Estate of Mahoney, 1.

Will.—The Fact That the Testator was an Habitual Drunkard may be proved by the evidence of his commitment as such, with proof that he has not adopted reformed habits of living.—Estate of Mahoney, 1.

Will—Intoxication of Testator.—It may be Shown That the Testator had an opportunity to procure liquor or that he had it in his possession, but his intoxication at any particular point of time cannot be inferred from the fact that at that time he had intoxicating liquors in his possession.—Estate of Mahoney, 1.

Will—Intoxication of Testator.—Where It Appears That the Testator had been drinking a short time before the execution of the will, evidence may be received to show how long it usually takes for a person to get sober. The period of time required for a person to become sober depends primarily on the person, and secondly on the quantity and nature of the intoxicants consumed.—Estate of Mahoney, 1.

Note.

adjudication of incompetency as showing want of testamentary capacity, 21–26.

appointment of guardian as affecting testamentary capacity, 21–26.

TRUSTEES.

See Trusts.

TRUSTS.

1. In General.

Trust.—An Express Trust Should Define its subject, purpose and beneficiary, and also its duration in regard to time.—Estate of Lamb, 432.

Trusts—Administrative Expenses—Payment from Current Income. The administrative expenses of a trust, namely, court and legal costs and expenses, office expenses and office administration and salaries and trustees' compensation, should come out of current income.—In re Woods, 451.

Trusts—Compensation of Trustee—Payment from Income.—A trustee is entitled to a reasonable compensation for his services as they are rendered, and unless a contrary intention appears, the compensation must come out of the income of the fund in the administration of which it is earned.—In re Woods, 451.

3. Validity.

Wills—Direct Devise or Void Attempt to Create Trust.—A devise in this case to the executor of the will as trustee for two designated beneficiaries "and the survivor of them for and during their lifetime" (both of whom predeceased the testatrix), and thereafter to "convey and transfer" the property to certain named persons, is held not a direct devise but a void attempt to create a trust.—Estate of Watson, 34.

Will—Invalid Trust.—A Bequest of All the Testator's Property in trust, to convert the estate into cash and keep the proceeds invested

and to pay the income thereof and such portion of the principal as may be necessary "until such time as the youngest of my two said children would, if alive, have reached the age of twenty-five years, at which time the remainder of my estate shall be divided equally between my two said children, or if one be dead, then to the survivor of them," creates a trust for a term of years and is invalid, being in violation of section 716 of the Civil Code of California, as it is possible in such case that the power of alienation is suspended by limitation for a longer period than during the continuance of lives of persons in being.—Estate of Bourke, 45.

Trust Void Because Discretionary.—A Trust Directing the Estate to be converted into cash and for the trustee to keep the proceeds invested and which directs that it "shall pay the income therefrom and such portion of the principal thereof in case such payment be necessary in its judgment" is void because it is discretionary and not imperative upon the trustee as to what it shall do. It substitutes the judgment of the trustee for the judgment of the testator.—Estate of Bourke, 45.

Trust—Jurisdiction to Determine Validity on Partial Distribution. Upon the ordinary notice in a partial distribution proceeding, the court has jurisdiction to determine upon the validity of a trust clause, in a will, in favor of minors absent from the state.—Estate of Lamb, 432.

4. **Life Estate—Taxes and Insurance.**

Trusts—Life Estate—Taxes—From What Property Payable.—In the case under consideration the taxes upon the unimproved property which produces no income should be paid out of the corpus of the estate; but the ordinary taxes of property in which there is a life estate, and the ordinary expenses of the care and management of the principal, are charges upon the life estate, to be paid out of the income.—In re Woods, 451.

Trusts—Life Estate—Duty to Pay Insurance—Deduction from Income.—A life tenant is not bound to insure the interest of the remainderman, but each may insure his own interest. A trustee who holds the legal title for both has the duty of insuring; and accordingly insurance premiums paid by a trustee would probably be universally treated as an ordinary expense of holding and managing the property, and so payable out of income.—In re Woods, 451.

5. Income from Property.

Trusts—Agreement Affecting Income Rights of Beneficiary—Power to Make.—An agreement between the trustees of a testamentary trust and the income beneficiary, whereby the interests of the latter are to be preserved by withholding certain properties from sale at a sacrifice, and the income rights of the beneficiary increased beyond what is contemplated by the instrument creating the trust,

cannot be justified on account of the unusual conditions which followed the great fire in San Francisco and which prevailed when the agreement was made, nor does it become binding upon the court because the court may seem to have accepted it in the settlement of uncontested accounts presented by the trustees.—In re Woods, 451.

Trusts—Net Income—What Constitutes.—Net income is "the income derived from the whole property, less the necessary expenses incurred in its management, and disbursements incurred on account thereof." It is simply "net," not "gross," income, and that is what the income beneficiary in the case at bar derived through the testamentary trust; and no former adjustment, even if not now reviewable, as to the previous accounts, although they were left to the court by the mutual consent of the then trustees of the trust and the income beneficiary, can relieve the court in the present instance of the duty of meeting the issue, for the first time presented in a seriously contested form.—In re Woods, 451.

6. **Encumbrances on Property—Payment—Interest.**

Trusts—Interest on Trust Indebtedness—How Chargeable.—The question in this case as to the payment of the interest on the trust indebtedness, which it is proposed to charge against capital entirely, is not correctly so chargeable, for the equitable tenant for life must pay the interest upon all encumbrances upon the estate, to the extent of the rents and profits.—In re Woods, 451.

Trusts—Interest on Encumbrances—Payment by Life Tenant.—Interest on encumbrances on trust property, for example, a mortgage, must be paid by the life tenant although it would not be safe for a remainderman as against the mortgagee to rely on the liability of the life tenant to pay the interest.—In re Woods, 451.

Trusts—Interest on Encumbrances—Payment from Income.—A trustee who places encumbrance on property, or allows one to remain, should pay the interest out of the income.—In re Woods, 451.

Trusts—Encumbrance on Property—Payment from Principal of Trust Fund.—If the trustee pays off the principal of the encumbrance, he should pay it out of the principal of the trust fund of which both the life tenant and remainderman are beneficiaries.—In re Woods, 451.

Trusts—Encumbrance on Property—Effect of Payment by Remainderman.—If a remainderman pays off the encumbrance, the life tenant must continue to pay interest to the remainderman, or what is more usual, must pay to the remainderman the present worth of an annuity equal to the annual interest running during the number of years which constitutes the expectancy of life of the tenant for life.—In re Woods, 451.

7. Accounts of Trustee.

Trusts—Accounts of Trustee—Conclusiveness and Finality of Allowance.—A ruling by the court on a testamentary trustee's accounts, clearly contrary to the terms of the trust as defined in the final decree of distribution, and the result of a judicial inadvertence based upon the fact that at the time of the settlement of the accounts there was no controversy as to the items thereof, though final as to the contents of those accounts, is not binding upon the court in relation to subsequent accounts of the trustee. While such accounts, unchallenged at the time, are unaffected after the term for appeal therefrom has passed, yet finality as to their adjudication may not be predicated with reference to their effect upon the future. Such settlements affected only the items contained in the accounts for the period.—In re Woods, 451.

Trusts—Separate Accountings of Trustees—Relation One to Another.—A judgment in one proceeding cannot control judicial action, the judgment, in another and independent action or proceeding; and every separate accounting of a trustee is an independent proceeding, distinct from every other accounting, past or future.—In re Woods, 451.

8. Foreign Corporation.

Trust—Foreign Corporation must Comply With Laws to Act as Trustees.—A foreign corporation, before it can be authorized to act as a trustee of an estate in this state, must comply with all of the laws of the state of California relative to trust corporations, the same as a resident corporation.—Estate of Bourke, 45.

UNDUE INFLUENCE.

See Contest of Will; Wills, 2.

1. In General.

Will—Undue Influence—What Constitutes.—A will is not to be set aside on the ground of undue influence unless there is proof of a pressure which overpowered and bore down the volition of the testatrix at the very time the will was made.—Estate of Bainbridge, 308.

Undue Influence.—Undue Influence, Such as Invalidates a Will, is something more than mere general influence not brought to bear upon the testamentary act; it must have been used directly to procure the will and have amounted to coercion, destroying the free agency of the testator.—Estate of Ellinghouse, 332.

Will—Undue Influence.—The Mere Existence of Confidential Relations between the testator and the principal beneficiary under his will, who is also the proponent, does not raise the presumption that the will was procured by the exercise of undue influence nor impose on the proponent the burden of disproving undue influence, fraud or coercion; there must be, in addition to that fact, evidence of his active

erted such an influence over her in the interest of the absent persons. Estate of Bainbridge, 308.

Will.—If a Presumption is to be Indulged, It is Rather in favor of a will when the testator leaves property to one with whom he had intimate and confidential relations during his life, as it is usually designed to give property to those whom the testator desires to favor. Estate of Mahoney, 1.

WILLS.

See Advancements; Annuities; Charities; Contest of Will; Election by Widow; Executors and Administrators; Probate of Will; Trusts; Undue Influence.

1. Execution—Witnesses.

Wills—Execution—Subscription at End—Signature of Testator in Attestation Clause.—Where a testator writes his name in a blank space in the attestation clause of his will, instead of at the usual place, the instrument will not be denied probate as not "subscribed at the end thereof," when it distinctly appears that it was intended by him, and so understood by the witnesses, as his subscription of the will.—Estate of Hartter, 293.

Will—Competency of Executor as Witness.—The executor named in a will is not, by reason of interest, disqualified to act as an attesting witness.—Estate of Egan, 28.

2. Omission of Words.

Will—Omission of Word—Whether Invalidates.—The inadvertent omission of a word will not be allowed to defeat a will if the intention of the testator can be discovered from the entire document, and a reasonable reading of its text, and a consideration of all the circumstances.—Estate of Espitallier, 299.

Will—Interpretation—Supplying or Changing Words.—In the construction of wills the intention of the testator must govern, and in order to carry out this, as collected from the context, words may be, when necessary, supplied, transferred or changed.—Estate of Espitallier, 299.

Will—Dollar-Mark Before Legacy—Omission.—The omission of the dollar-mark before the figures of a legacy is frequent in wills, and is implied by courts construing them.—Estate of Espitallier, 299.

3. Interpretation.

Wills—Interpretation of Technical Terms—Testament Drawn by Notary.—The rule of relaxation in the interpretation of technical words in a will, when the instrument has been drawn by "an unskilled hand," is here discussed in relation to a will drafted by a notary public.—Estate of Willson, 34.

Wills—Intention of Testatrix—How Ascertainable.—In interpreting paragraphs of a will the intention of the testatrix must be found in the context, and it must accord with the law. The question is not what she meant, but what her words mean; and the intention must clearly appear to be lawful.—Estate of Willson, 34.

Wills—Canons of Construction—Duty of Courts to Obey.—In interpreting wills courts are bound to carry out canons of construction, no matter how technical they may seem to those who have not studied their philosophy, and one of these rules is, most imperatively imposed, that courts must stand by the words of the will.—Estate of Willson, 34.

Wills—Interpretation—Consideration of Extrinsic Evidence.—In determining the intention of a testatrix the court can consider the circumstances surrounding the execution of the will only when inconsistencies or ambiguities in the language used make the intention as declared by the will doubtful.—Estate of Willson, 34.

Wills—Interpretation—Bequest to Children.—In construing the will in this case the court finds that the bequest to "children" in paragraphs 8 and 9 is to be construed as to a class; that it comprehends only those who were living at the death of testatrix; that there is no ambiguity in the testamentary expression, and the intention of testatrix is therein evident; that upon the decease of testatrix there were and are now persons within the descriptive terms of the will; that the word "children" must be construed and interpreted as "immediate offspring"; and that such persons are entitled to distribution. Estate of Willson, 34.

Will—Bequest of Interest in Estate—Acquisition of Interests of Other Beneficiaries.—A bequest in a will of all the testator's "interest in the estate" of a named decedent will be construed to pass not only such interest as vested in him as a beneficiary of such estate, but also such further interests as he may have acquired in the property thereof by succession or bequest from other beneficiaries, where such estate was in process of administration at the time of the death of the testator, and his interests therein constituted the whole of the property left by him.—Estate of O'Gorman, 245.

Will—Instrument Drawn by Layman—Interpretation.—A will drawn by a person not educated in the ordinary sense, nor skilled in the use of legal formulae, is not to be treated with the strictness that is applied to the work of a professional draftsman.—Estate of Espitallier, 299.

Will—Disposition of Entire Estate—Presumption.—A will, as such, raises the presumption that its maker intends to dispose of his or her entire estate, and not to die intestate as to a part; and the presumption is strengthened by the absence of a residuary clause.—Estate of Espitallier, 299.

Will—Instrument in French Language—Kind of Money Bequeathed. If, in a will in the French language, there is an absence of express words or signs indicating the sort of money to which numerical figures used have reference, in respect of legacies, the word "dollars" or "francs" may be read into the will according to the aptness of either in the opinion of the court, judging from the connection and the circumstances.—Estate of Espitallier, 299.

Will—Community Property.—A General Devise of All the Property a testator may die possessed of, without any specific property being named, applies to but his moiety of the community property, if a married man.—Estate of Lamb, 432.

Will—Interpretation—Property Coming to Estate After Death.— If a testatrix by her will disposed of all the property she knew she owned to her three children, but not in uniform ratio, other property coming into the estate after her death but before final distribution should be distributed in equal shares according to the rules of succession, notwithstanding the spirit of the will.—Estate of Pratt, 506.

4. Duty to Provide for Relatives.

Will.—A Testator has No Legal Burden Imposed upon Him to Provide for His Uncle, and a failure so to provide is neither unnatural nor necessarily undutiful, especially where the person unprovided for is unknown or thousands of miles distant, and where no communication or correspondence passed between such collateral relative and the testator.—Estate of Mahoney, 1.

Will—Duty of Testator to Provide for Nephews and Nieces.—An uncle or an aunt is under no obligation to provide for nephews or nieces either when living or by will.—Estate of Bainbridge, 308.

5. Specific Legacies.

Will—Specific Legacies are not Favored by the Law, and in cases of doubt legacies are held general or demonstrative, rather than specific; the reason for this is that specific legacies are not liable for the debts of the testator, and on the other hand they fail or are adeemed if the thing or fund is not in existence at the time of the death of the testator.—Estate of O'Gorman, 245.

Will—Specific Devise.—A devise of an interest in an estate of a deceased person is specific.—Estate of O'Gorman, 245.

6. Residuary Bequests.

Will—Residuary Bequest Subject to General and Specific Bequests. If there is a residuary bequest made by a will, it is subject to the payment of legacies, both general and specific, and in such case it is unnecessary to determine whether a particular legacy is general or specific.—Estate of Richardson, 354.

Will.—A Residuary Bequest in a will is not made the less such by the testator using the words "consisting of" and proceeding to

WITNESSES.

WORDS AND PHRASES.